

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of:	Chapter 11
MORGANSEN'S LTD.	03-80994
Debtor	

Motion to Expedite for a Proposed Public Auction Sale

United States Bankruptcy Court
Central Islip, New York

October 1, 2003
10:30 a.m.

B E F O R E:

HONORABLE STAN BERNSTEIN,
Bankruptcy Judge

A P P E A R A N C E S:

MELTZER, LIPPE & GOLDSTEIN, LLP
Attorneys for Trustee
190 Willis Avenue
Mineola, NY 11501

BY: NEIL H. ACKERMAN, ESQ.
CHARLES A. BILICH, ESQ.

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BY: WILLIAM F. BATES, ESQ.

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Attorney for Carey Turnbull
329 Middle Country Road
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BY: ALAN TODD COSTELL, ESQ.

DAVIDOW, DAVIDOW, SIEGEL & STERN, LLP.
Attorneys for Evelyn A. Rupolo
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BY: WALLACE DAVIDOW, ESQ.

A P P E A R A N C E S (CONT.):

OFFICE OF THE UNITED STATES TRUSTEE
560 Federal Plaza
Central Islip, New York 11722

BY: TERESE CAVANAGH, ESQ.

ALSO PRESENT:

Maur Dubin

Paul M. Faver

Barbara Goldberg

Marvin Goldberg

June Kessler

Jennifer R. Miller

Tasha Moody Piazzola

Phil Pape

Eileen Cronin, Court Reporter

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Mr. Maltz	180	197	214		

P R O C E E D I N G S

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THE COURT: Please be seated.

THE CLERK: Matter on Morgansen's Ltd.

THE COURT: Can I have your appearances?

MR. COSTELL: For Carey Turnbull, Alan Todd
Costell, 329 Middle Country Road, Smithtown, New York 11787.

THE COURT: You can give your cards to Ms.
Cronin. I just need to know your first and last name and
who you represent. Your name is? What happened to the last
person who ran right by me before I could do anything.

MR. COSTELL: My name is Alan Todd Costell.

THE COURT: Alan Todd Costell.

MR. COSTELL: C-O-S-T-E-L-L.

THE COURT: And you represent who?

MR. COSTELL: Carey Turnbull.

THE COURT: Is that the only person or do you
have others?

MR. COSTELL: That's all.

THE COURT: Okay.

MR. BATES: William F. Bates for the Estate of
Esther O'Keefe.

THE COURT: William Bates?

MR. BATES: Yes, sir.

THE COURT: The estate of Esther O'Keefe. All
right.

1 MR. GOLDBERG: Marvin Goldberg, your Honor. I
2 represent myself and my wife Barbara Goldberg.

3 MR. FAVER: Your Honor, my name is Paul Fava
4 here on behalf of myself. F-A-V-E-R.

5 THE COURT: All right.

6 MR. PAPE: Your Honor, Phil Pape representing
7 myself.

8 THE COURT: Your name? You can pick up the
9 mike.

10 MR. PAPE: Phil Pape, 101 Foster Crossing,
11 Southampton, New York.

12 THE COURT: Spell your name please.

13 MR. PAPE: P-A-P-E. Like paper without the r.

14 MS. MOODY: Good morning. I am here to claim
15 something, and I am representing myself. Tasha Moody. M-O-
16 O-D-Y. PIAZZOLA.

17 THE COURT: Slowly please. Last name -- M-O-
18 O-O-D-Y.

19 MS. MOODY: Thank you.

20 MR. DAVIDOW: I am Wallace Davidow.

21 THE COURT: Wallace?

22 MR. DAVIDOW: Wallace Davidow representing
23 Evelyn Rupolo.

24 THE COURT: How do you spell her name please?

25 MR. DAVIDOW: R-U-P-O-L-O.

1 THE COURT: Okay. Thank you. Anybody else?
2 MS. KESSLER: June Kessler, representing
3 myself.
4 THE COURT: Your name is?
5 MS. KESSLER: June. J-U-N-E. Kessler. K-E-S-
6 S-L-E-R.
7 THE COURT: K-N-E --
8 MS. KESSLER: No. K-E-S-S-L-E-R.
9 THE COURT: Okay.
10 MS. KESSLER: Thank you.
11 MS. MILLER: Jennifer R. Miller, representing
12 myself.
13 THE COURT: And your last name is Miller.
14 MS. MILLER: Yes, sir.
15 THE COURT: Okay.
16 MR. ACKERMAN: Neil Ackerman, Trustee and also
17 appearing for counsel for the Trustee at Meltzer, Lippe &
18 Goldstein.
19 THE COURT: All right. Is there someone from
20 your firm who is going to deal with the legal issues?
21 MR. ACKERMAN: Yes.
22 THE COURT: Your name?
23 MR. BILICH; Charles A. Bilich. B-I-L-I-C-H.
24 THE COURT: Look. I am going to tell all of
25 you one time. The acoustics in this courthouse are very

1 poor. It is a rather cavernous room. It may be designed to
2 impress you. It is not designed to facilitate
3 communications between litigants and their counsel and the
4 courthouse. So you have to speak directly into the
5 microphone. It doesn't pick up a very broad range. You
6 move away from the microphone by more than a few inches, I
7 have difficulty hearing you even though you are just a few
8 yards in front of me, and we won't be able to get a recorded
9 tape of this.

10 We have these tape machines so that persons who
11 appear at these hearings and save themselves the expense of
12 ordering transcripts so they can listen to the tapes at
13 their own leisure, and if they want to transpose them, they
14 can do that.

15 You don't have to stand up at the podium to
16 address the Court. If it is more comfortable for you to sit
17 down at the table, I don't treat it as an act of disrespect
18 by any means. So you can use the table, spread out your
19 papers, and speak directly into the microphone.

20 The house rules are only one person at a time.

21 All right. So I don't want a free for all here.
22 And I understand for some of you, this is a matter of
23 considerable anxiety if not anger. I have to deal with the
24 facts on legal issues. So I want there to be suitable
25 restraint addressing those instances. I have not made up my

1 mind about anything, and I know the lard in this area even
2 with the revised uniform commercial codes still remains
3 somewhat opaque.

4 So Mr. Bilich, why don't you explain to me if you
5 would please and to the others assembled, what is the
6 position of the Trustee. I am not interested in the
7 historical exercise. I am interested in what is the status
8 of the UCC as amended and what was the effective date of
9 those provisions with respect to the issues before the
10 Court.

11 MR. BILICH: Yes, your Honor. The position of
12 the Trustee, your Honor, is that this case is squarely
13 covered by Section 2-326 of the Uniform Commercial Code
14 which became effective in the State of New York on July 1,
15 2001 in conjunction with the revision of Article IX that
16 became effective in New York State on that date, and it was
17 meant to conform that portion of Article IX so they would be
18 consistent.

19 THE COURT: Were there any non-uniform
20 variations on the issues specifically before the Court
21 enacted by the New York State Legislature or did it adopt
22 the proposed revisions recommended by the Uniform Commercial
23 Code Law Revision Committee?

24 MR. BILICH: Section 2-326 is the Uniform
25 provision.

1 THE COURT: Okay.

2 MR. BILICH: That section provides that -- first
3 of all it has a definition called -- defines a term called
4 sale or return where if a person delivers goods for the
5 purpose of resale, that is deemed to be a sale or a return,
6 and secondly, it provides a rule that goods being held on
7 sale or return are subject to the claims of creditors in the
8 possession -- creditors of the person holding the goods, and
9 the only other point which I want to make which I think is
10 very critical to this is that Section 2-326 ignores the
11 agreement between the consignor and the consignee.

12 The only requirement for being within its
13 coverage is that the goods must be delivered for resale, and
14 we think -- I think that the terms of the agreement between
15 the consignor and the consignee which obviously are not
16 available to the third party creditors whose rights this
17 action in part deals with are both logically and in terms of
18 construction of the statute, are largely irrelevant as long
19 as the purpose and the intent of the arrangement is a sale
20 or return. That's the way we see it. We see it; it's just
21 that simple.

22 THE COURT: I don't see it that simple. If we
23 go through the definitional sections and you tell me that it
24 squarely fits within 2-326. 1) Unless otherwise agreed if
25 delivered goods may be returned by the buyer even though

1 they conform to the contract, the transaction is B) a sale
2 or a return of the goods delivered primarily for resale.

3 So I don't understand why you begin to say that
4 the parties agreement is irrelevant because under 2-326
5 there is a provision that basically permits the parties to
6 opt out based upon an agreement. So it can't be the case
7 that the agreement between the parties is irrelevant, and I
8 do this in some kind of an objective basis, at least as I
9 read the statute on its face.

10 MR. BILICH: I grant you that there is a second
11 condition which you have identified to the operation of this
12 provision which is that the agreement of the parties, of the
13 consignor and the consignee, must be that the consignee can
14 return the goods at will. I think that's really the
15 language that you are citing I believe.

16 THE COURT: I'm just picking up in your
17 statement that agreements between the parties are
18 irrelevant.

19 MR. BILICH: Well, I'm amending that.

20 THE COURT: Okay, fine. And I am going to
21 Paragraph 3. Two is irrelevant. Paragraph 2 says good held
22 on approval. We're not dealing with those. It says goods
23 held on the sale or return to such claims while in the
24 buyer's possession and I have to start 2 from the beginning
25 because there is a reference. Goods held on approval which

1 are defined in 1(a) to say that if the goods are delivered
2 primarily for use as opposed to resale. Goods held on
3 approval are not subject to claims of the buyer's creditors
4 until acceptance. Goods held on sale or return are subject
5 to such claims which would mean that the buyer's creditors
6 while in the buyer's possession.

7 So, you are relying upon 2-326; 2 in particular;
8 the second part of that.

9 MR. BILICH: That is correct.

10 THE COURT: And then it says any or returns
11 from the sale for any or return term of a contract for sale
12 is to be treated as a separate contract for sale in the
13 statute of frauds section of this article Section 2-201 and
14 it is contradicting the sale aspect of the contract within
15 the provisions of this article on parole or extrinsic
16 evidence. No. When I read that it is hardly self-
17 explicating, and I go flipping back through the other
18 sections to understand this. If there is no written
19 contract between the parties, and it is simply an oral
20 agreement. So walk me through the situation when there is
21 only an oral agreement. Is the sale or return of the item
22 enforceable because it is not in writing? Are there
23 exceptions under the statute of frauds? Have you gone
24 through 2-201 to make sense of this Paragraph 3?

25 MR. BILICH: I really haven't focused on 3. We

1 didn't see any,

2 MR. ACKERMAN: Your Honor, may I step in here?

3 THE COURT: Yes.

4 MR. ACKERMAN: With respect to that, what you
5 are pointing out, the official comment --

6 THE COURT: You have to speak into the
7 microphone.

8 MR. ACKERMAN: In respect to the comments that
9 you are pointing out, I think official comment three to the
10 new provisions on that same page is important. You are
11 correct. I do believe that the contract is important; and
12 as set forth specifically in official comment three,
13 starting on the fourth line, the oral return aspect of a
14 sales contract must be treated as a separate contract under
15 the statute of frauds section and is contradicting the sale
16 insofar as --

17 THE COURT: It's just repeating the rule. It
18 doesn't explain anything to me.

19 MR. ACKERMAN: So I definitely agree, totally
20 that the agreement is compelling.

21 THE COURT: Okay. So the question is if I
22 have an oral agreement, and there is no writing, is it
23 unenforceable because it doesn't comply to the statute of
24 frauds; and if it is unenforceable, where does that leave
25 the buyer's creditors?

1 MR. ACKERMAN: I believe we would then look at
2 the official comment 4 and the fourth official comment
3 states that certain true consignment transactions were dealt
4 with in former Sections 2-326 and 9-114. These provisions
5 have been deleted and have been replaced by new provisions
6 in Article 9. So basically, what this would be saying is at
7 the very minimum, a UCC should be filed. And that's how
8 creditors of Morgansen's --

9 THE COURT: That's the writing you think?

10 MR. ACKERMAN: It could be --

11 THE COURT: That's a perfection rule.

12 MR. ACKERMAN: Well, I believe that UCC Article
13 9 provides that there must be a security agreement --

14 THE COURT: It says I have to go -- look.
15 This is always a question of chasing your tail. I have to
16 go to Section 9-109 A4, 9-103 D and 9-319 for whatever
17 illumination those sections offer because these new sections
18 trump the old law, and I assume under the prior version
19 which included a different subsection 3, the rights at first
20 blush of persons delivering goods on sale or return vis-a-
21 vis the buyer's creditors are reduced in scope. In other
22 words, as I look at this, someone selling on sale or return
23 -- someone delivering goods on sale or return to a consignee
24 or a party holding these goods for resale were have been
25 able to take these goods out of the category of property of

1 estate and the Trustee couldn't realize upon these goods.
2 So is the move, if I understand it correctly in favor of the
3 creditors under the revised code; i.e. the creditors of the
4 buyer. And if you want to as the consignor or the person
5 selling through a resale agent, is it your obligation to
6 make those a public filing; and if you don't do it, you're
7 stuck.

8 MR. ACKERMAN: I have always felt so, sir, and I
9 have always provided for security interest. However there
10 is a strange twist here. And that would be compelling in
11 respect of any oral agreement as opposed to a written
12 agreement. The strange twist is that Article 9 of the UCC
13 has an interesting new provision which is not referred to in
14 the official comment 2-326. And may I invite your attention
15 to Section 9-102 of the UCC.

16 Sir, I have another copy of it.

17 THE COURT: I have 9-102 right here. I have
18 the New York version.

19 MR. ACKERMAN: This might be easier to review if
20 you would like. May I hand it to your law clerk.

21 THE COURT: I have it. Can't I read this one?
22 Is your version better than mine?

23 MR. ACKERMAN: No. Not in any way, shape, or
24 form.

25 THE COURT: This is the New York statute.

1 It's annotated. Thank you for your help.

2 MR. ACKERMAN: Judge, I apologize.

3 THE COURT: Okay. So I am in 9-102 and what
4 subsection?

5 MR. ACKERMAN: There are several different
6 sections which deal with consignment in 9-102 which carries
7 directions and definitions for Article 9. The first one is
8 A 19.

9 THE COURT: A 19. Okay. Mr. Ackerman, I
10 began my legal career teaching the UCC, and it was such a
11 mind bending exercise, that I decided to drop it in favor of
12 something simpler called bankruptcy law.

13 MR. ACKERMAN: Which led you right back to the
14 conundrum of dealing with the UCC.

15 THE COURT: And bankruptcy law got so
16 complicated, that I was tempted to do environmental law.
17 That had to be easier. I have some difficulties here. I'm
18 in A 20?

19 MR. ACKERMAN: A 19, A 20, A 21, A 22.

20 THE COURT: Subsections 19 through 22, right?

21 MR. ACKERMAN: Yes.

22 THE COURT: So you are calling my attention to
23 consignee means of merchant to which goods are delivered in
24 a consignment. So then I have to decide what's a merchant.
25 Then under 20 consignment means a transaction regardless of

1 its form in which a person delivers goods to a merchant for
2 the purpose of resale.

3 MR. ACKERMAN: Purpose of sale.

4 THE COURT: Purpose of sale. And A the
5 merchant, so I need to define that term deals in goods of
6 that kind under a name other than the name of the person
7 making delivery. So clearly Morgansen's is an entity other
8 than operating under that name other than the name of the
9 persons making the delivery of the goods. Two is not an
10 auctioneer and here we begin to have a problem.

11 MR. ACKERMAN: Yes. Now from what we know
12 about 70% of Morgansen's good -- Let me step back, Judge. I
13 apologize. Morgansen's did not sell only at auction.
14 Indeed it held --

15 THE COURT: I understand that.

16 MR. ACKERMAN: Indeed it held a few auctions.

17 THE COURT: Okay, but we have a fact question
18 here.

19 MR. ACKERMAN: Yes.

20 THE COURT: And I know Morgansen's did have
21 certain auctions and it was the subject of considerable
22 commentary on the record in connection with Chapter 11, and
23 I know that she was counting upon the success of those
24 auctions to continue to provide sufficient funds--namely,
25 her percentage of the sales to continue her operations. And

1 we had a terribly rainy spring and summer. We didn't know
2 what was the occupancy level of persons taking their
3 vacations on the East End and what affect that would have.
4 We didn't know where the market was and whether or not
5 persons from Wall Street and other financial intermediaries
6 and/or Hollywood stars would be traipsing out to the East
7 End particularly because of security concerns with
8 international and perhaps domestic flights. So there were a
9 number of rather considerable variables that we couldn't
10 quantify at the beginning of the case. I know there were at
11 least two auctions that were conducted. But I also know
12 that Mrs. Brunesco said that she had a base of customers who
13 were interior decorators or persons working with interior
14 decorators who were some of her principal customers. And
15 those would be private sales and not auctions.

16 MR. ACKERMAN: Additionally, the store was open.

17 THE COURT: But you know, we didn't develop
18 any law in the case. I am simply recalling the various
19 statements and testimony made during numerous hearing. So
20 let's assume that a merchant, and I believe she is a
21 merchant under the definition. She surely held herself out
22 as a merchant. Where is the definition of merchant. It is
23 not under 54. It's not where it should be.

24 MR. Bilich: It's probable under Article 1 or
25 Article 2 definitions. It's probably under the definitions

1 for Article 1 or Article 2.

2 THE COURT: We'll hold off that to the side.
3 I don't think there is any dispute that she was a merchant,
4 but we will double check on that. If a merchant engages in
5 auctions as part of her normal business activity, how does
6 it affect its construction. Are there any cases that say if
7 your gross sales for a year are based upon auctions and
8 private sales, is it a situation in which a majority of
9 revenues produced by auctions make you an auctioneer. If
10 auctions are 10% of your business, does that affect you? Is
11 there a quantitative measure? Is it an either or situation?
12 Once you engage in any auction, you're tossed out of this
13 section? Because this section is not self-defining on that
14 issue.

15 MR. ACKERMAN: There has not been one case that
16 construed new Article 9-102 A 20.

17 THE COURT: But weren't there prior cases in
18 which the word auctioneer was used. Couldn't we go back to
19 the prior section and rely upon. If there is a law defining
20 who is an auctioneer under the predecessor sections, and I
21 assume that the concept of auction hasn't changed from the
22 pre-99 versions to the 99 amendments. So it's not that we
23 are without possibilities of finding an answer.

24 MR. ACKERMAN: You are correct, Judge. They
25 were dealt with under old Section 2-326 (3).

1 THE COURT: That was the section that was
2 dropped.

3 MR. ACKERMAN: That was the section that was
4 dropped, and there the cases -- there were many cases -- it
5 became a question of fact.

6 THE COURT: Right, I understand that.

7 MR. ACKERMAN: Some courts were saying 85% of
8 the public knowing you are an auctioneer is not good enough.
9 It was all over the place.

10 THE COURT: And who had to know that you were
11 an auctioneer. Wasn't it the merchant's creditors. It
12 wasn't the consignor's creditors, or the sale or return
13 people. The test was what did the -- in this case debtor's
14 creditors know. Right?

15 MR. ACKERMAN: Yes. The debtor's creditors and
16 the public.

17 THE COURT: Okay, and we know based upon the
18 activities in this case, who are some of the principal
19 creditors in the Chapter 11 most particularly the landlord,
20 and I am sure the landlord had a very good understanding of
21 the nature of Ms. Brunesco's business; and if he knew that
22 she engaged in auctions and you're the representative of the
23 creditors of this estate, then how does that play out if her
24 most substantial unsecured creditor was her landlord?

25 MR. ACKERMAN: Judge, there are a lot of other

1 creditors including and this is quite interesting, the New
2 York State --

3 THE COURT: There is a lot of insider debt,
4 loans from her father or other members of the family.

5 MR. ACKERMAN: Oh, I'm not going to count that
6 sir.

7 THE COURT: So excluding insider debt.

8 MR. ACKERMAN: -- New York State Department of
9 Taxation and Finance which filed a warrant for sales taxes.

10 THE COURT: Okay.

11 MR. ACKERMAN: Now that would not be the
12 liability of the auctioneer. If it was an auction sale, it
13 would be the liability of the principal. But these were
14 undisclosed principals. In fact, this was a
15 wholesale/retail operation which also did some sales.

16 THE COURT: Unlike the landlord, you surely
17 couldn't attribute actual knowledge to the sale of her
18 operations. They would simply issue warrants on whatever
19 theory. They didn't go out and check her business. They
20 didn't go review her books and records. Right?

21 MR. ACKERMAN: I would presume New York State
22 Department of Taxation and Finance did either check returns
23 or check something; and in fact, there was an objection
24 filed by them simply saying we are a secured creditor, and
25 we want it to be known that we are secured for sales taxes.

1 THE COURT: Secured creditor of Morgansen's.

2 MR. ACKERMAN: Of Morgansen's. The Department
3 of Treasury of the Internal Revenue Service likewise. New
4 York City Department of Finance --

5 THE COURT: Is there any provision outside of
6 the main C Code that establishes the rights between the
7 taxing authorities and persons who deliver goods on sale or
8 return or is all the law to be found under the UCC.

9 MR. ACKERMAN: It's all under the UCC, Judge.

10 THE COURT: Okay.

11 MR. ACKERMAN: If this was just an auctioneer;
12 let's suppose we are talking Martin Fine & Co., David Maltz
13 & Co., Inc.

14 THE COURT: Call themselves as auctioneers.

15 MR. ACKERMAN: It's the only thing they do.
16 Like they sell for Neil Ackerman, Trustee of Morgansen's.
17 That's a whole different situation. This was Morgansen's
18 which was a store that was open five days a week during the
19 summer -- 5 to 7 days a week during the summer; 4 days a
20 week.

21 FEMALE VOICE: I object.

22 THE COURT: Excuse me. Listen. I told you.
23 I am not going to have these interruptions. You will have
24 an opportunity to speak, but I am going to turn this into a
25 free-for-all. Just be careful. And if you persist, I will

1 have you removed. That's why that gentleman is in the back
2 row, because some of you have been more than a little testy.
3 Both the comments in the papers and in what I understand to
4 be actions taken against the Trustee. You will have your
5 opportunity to explain your position. I am just trying to
6 understand the Trustee's point, because he is the moving
7 party.

8 Go ahead, Mr. Ackerman.

9 MR. ACKERMAN: This was an entity that bought
10 goods on its own account, sold goods on its own account.

11 THE COURT: You mean it had an inventory.

12 MR. ACKERMAN: Yes.

13 THE COURT: That was part of its goods.

14 MR. ACKERMAN: Yes. Always did consignment
15 agreements as far as we know. That was how I was able to
16 build a list of consignors to give notice to.

17 THE COURT: The only reason you got that list
18 was because I came down with both feet on the debtor's
19 counsel.

20 MR. ACKERMAN: No, he didn't give it to me.

21 THE COURT: He was directed to amend his
22 schedules. I'm just telling you what happened here. I have
23 a rather distinct recollection of this. When debtor's
24 counsel appeared here, I said how come you haven't listed
25 any of the consignors as creditors, whatever their rights

1 might be. He said, oh, I didn't realize that. I was just
2 dealing with the trade creditors and the landlord and the
3 taxing authorities. I said, well, you have to describe all
4 property held by the debtor and since you have already told
5 me that you view some of these as consignments, then they
6 have rights, and you better list them. So he then amended
7 the schedules, presuming consultation with Ms. Brunesco and
8 generated based upon the best information she had a list of
9 persons who had delivered goods to her --

10 MR. ACKERMAN: Yes, Judge. Unfortunately, I
11 apologize.

12 THE COURT: -- Now it may be an incomplete
13 list, but there surely was a list because I was not going to
14 permit this case to go forward in Chapter 11 unless those
15 parties were given an opportunity to participate in the case
16 by being added to the schedules, even if they were disputed
17 claims, and they would receive notices of all matters
18 requiring notices to the universal creditors.

19 MR. ACKERMAN: I know about what you directed
20 him to do, and I saw the amended schedules. I looked them
21 up, and they were 1½ pages. When I first saw the very first
22 proposed consignment agreement, I went -- I was like oh my
23 God, oh my God. I have to give notice to everybody. And I
24 looked it up, and I called up Mr. Weiss who had been the
25 attorney during the 11, and I said where is the list of

1 consignors. He said the Judge directed me to file them.
2 It's two pages.

3 So I directed by accountant to go through all
4 books and records. We took all phone calls that came in.
5 There was a sign placed on the door of Morgansen's which
6 told people they call the auctioneer. The auctioneer, David
7 Maltz & Co. was directed to notify all people of me, and I
8 would then speak with them directly. We compiled a list
9 through phone calls, looking through books and records, et
10 cetera.

11 That list turned out to be 12 to 13 pages long.
12 I am going to be making application in order to amend the
13 court's docket and in fact, Judge, we still get phone calls
14 every day. We are hoping the publication notice that we are
15 asking for will route out more.

16 THE COURT: Well, I appreciate your effort. I
17 am discouraged when I hear that Mr. Weiss did not do his job
18 or Ms. Brunesco didn't give him all of the information that
19 she had and should have given him because my point on this
20 is that everyone who has an interest in this estate or
21 claims to have property that is not property of the estate
22 should be given notice and an opportunity to appear.

23 MR. ACKERMAN: I absolutely feel that. That's
24 why I would not submit the application until I had the best
25 complete list of consignors that I could imagine.

1 THE COURT: When you go through this list, how
2 many people are we talking about? In aggregate numbers.
3 Are we talking 50 persons, 100 persons, 200 persons?

4 MR. ACKERMAN: One second, Judge. I apologize.
5 The list was attached to the Affidavit of Service. It goes
6 on. It might be 200-300 people, Judge. It goes on for
7 about -- I'm holding in front of you a stack about 1/8 inch
8 of paper.

9 THE COURT: Mr. Ackerman, before we go too
10 far.

11 MR. ACKERMAN: Yes, Judge.

12 THE COURT: Someone has naively moved for a
13 class representative. I do think for those of you who are
14 here today, there should be some kind of arrangement in
15 which we treat you as a committee of persons asserting
16 certain rights of return and goods that you caused to be
17 delivered to Morgansen's, and I think that committee should
18 give consideration to retaining counsel so that we don't
19 have a number of persons who are pro se, and are walking
20 into a legal land mine because I have to tell you that this
21 area is very difficult. It has burdened us all for many,
22 many years. I have been practicing bankruptcy and
23 commercial law for close to 30 years, and unfortunately, I
24 was the UCC person in my law firm. So I had to deal with
25 this in many contested matters over many years with disputes

1 between secured creditors, banks, and others and debtors,
2 and claimants.

3 And it seems to me first of all, Mr. Ackerman
4 shouldn't have to deal with 200 to 300 people if you are all
5 in the same boat. You may not all be in the same boat. You
6 may have different kinds of agreements. Some may be in
7 writing. Some may not. Some may be subject to other
8 conditions, but it seems to me that rather than to burden
9 each of you with having to come to court, because I know
10 that you have businesses and other activities that you have
11 to attend to, it probably makes sense to pool your resources
12 in some way, and retain counsel, and I am not pushing anyone
13 here, but to retain counsel who is capable of addressing
14 these issues on an expedited basis in making some kind of
15 determination of what's the appropriate way to proceed.

16 I have to tell you that the customary way in the
17 courthouse in bankruptcy cases is to authorize the sale of
18 the goods, make sure they are adequately advertised with
19 notice to all creditors, and public notices to the world of
20 persons who tend to buy these kinds of goods, and then there
21 is a period of time for examination and then some kind of
22 proceeding where the court determines any objections to the
23 proceeding. And then what we do, we take the proceeds, have
24 them held in escrow, pending further determinations. It is
25 quite unlikely that my initial move would be to start

1 directing the Trustee to return goods.

2 I am open to argument about that, but I do think
3 that for most of you, you did this in order to generate
4 proceeds. You wanted to have them sold. And if we can
5 develop a mechanism that maximizes the sales proceeds, that
6 may be the most economical way of doing it and then we can
7 deal with your individual claims under the facts of your
8 particular agreements. The Trustee has some insurance.

9 Is that correct Mr. Ackerman? Do you have
10 insurance on these goods?

11 MR. ACKERMAN: Yes, we actually got it. It took
12 an amazing amount of effort. It is in place now, Judge.

13 THE COURT: What are the policy limits?

14 MR. ACKERMAN: One second, Judge. I apologize.
15 We have liability of \$2 million aggregate and \$1 million per
16 occurrence. We have a deductible of \$5,000. We are insured
17 for \$500,000 on personal property. That is multi-peril
18 against all things including theft. In order to get the
19 theft insurance, we had to turn on the alarm system last
20 Friday.

21 THE COURT: Well, surely, I don't have to tell
22 the persons who are here that any self-help effort on your
23 part to recover goods that now remain in the custody of the
24 Court pending further legal determinations, will be dealt
25 with very harshly because if we have to hire investigators

1 to chase who it is, anyone who converts goods of the estate
2 subject to a determination whose rights they are will end up
3 being reported to the United States Attorney's Office,
4 because you live in fear with the federal administration of
5 an insolvent estate. So, however, hot you may be under your
6 collar, I have to protect everyone's respective rights in an
7 order of priority. If anyone tries to break in, they will
8 be dealt with to the fullest extent of the law.

9 This isn't a threat. That's exactly what is
10 going to happen. Now, I don't know any of your. I assume
11 that you would not resort to self-help no matter how
12 strongly you believe your claims to be. We will deal with
13 them on an expedited basis in an orderly manner. But it is
14 important that these assets be insured. You are probably in
15 a better position now than you were under Ms. Brunesco's
16 management; however, ironic that might seem to you.

17 MR. ACKERMAN: Judge, in fact, Ms. Brunesco
18 didn't tell you. The insurance was cancelled effective I
19 believe June 9. We didn't know that; and when we found
20 that, that was when I started calling up for insurance on an
21 expedited basis. It had not been insured for some three
22 months.

23 THE COURT: And some of you may have
24 individual claims against her. I am not deciding that now.
25 All I'm dealing with is the estate claims. You may have

1 state law claims that could be asserted against her
2 individually. Whether it's collectable, is another story.

3 MR. ACKERMAN: Judge, may I add in that vein
4 that there are --

5 THE COURT: Let's go. Now that the goods are
6 insured, you have reasonable policy limits, that you have
7 secured the premises, even though it is in a fairly remote
8 location, let's get back to the issue of auctioneer.

9 So you say that's fact. Who's got the burden of
10 proof whether she is an auctioneer or she isn't an
11 auctioneer.

12 MR. ACKERMAN: Well, the situation, Judge, is
13 this. If it is an auctioneer, then it is governed by
14 Article 9 -- pardon me, if it is not an auctioneer, then it
15 is governed by Article 9. Show me UCC.

16 THE COURT: Wait a minute. If he is an
17 auctioneer, it is governed by what?

18 MR. ACKERMAN: If she is an auctioneer, we
19 believe, it is governed just be 2-326.

20 THE COURT: Okay.

21 MR. ACKERMAN: If she is --

22 THE COURT: Which I thought takes these
23 matters out of 2-326.

24 MR. ACKERMAN: The only reason why I believe is
25 that you were talking about the oral agreements.

1 THE COURT: Look, when I deal with the
2 statute, I go to 2-326, then I have to go jumping into the
3 other provisions we've been discussing. I thought that if
4 these goods are delivered to an auctioneer, they fall
5 outside of the scope of 2-326 as an exception.

6 MR. ACKERMAN: I think he would fall outside of
7 the scope of Article 9, but it would be under Article 2-326.

8
9 THE COURT: Well, you'll walk me through this.
10 All right. Go ahead.

11 MR. ACKERMAN: I think that she is not an
12 auctioneer, Judge, and I also feel that this section is also
13 horrible. I can't even believe if you --

14 THE COURT: What's your argument that she is
15 not an auctioneer?

16 MR. ACKERMAN: Because there was a wholesale and
17 retail operation pending. Because the sales tax was the
18 responsibility of Morgansen's and not of the consignors.

19 THE COURT: That may be the position asserted
20 by the State. The State may be wrong.

21 MR. ACKERMAN: No consignor --

22 THE COURT: Just because the State files a
23 warrant to collect sales tax, it doesn't decide the legal
24 question of whether the sales tax is the responsibility of
25 Morgansen's or of the party delivering the goods for resale.

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MR. ACKERMAN: I don't think consignors did pay sales tax, Judge, but let's move on. You're right.

4

THE COURT: What's that?

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MR. ACKERMAN: I don't think they did pay sales taxes, but you're correct, let's move on. There was no disclosed principals. The goods were all co-mingled together. They were not segregated. Like this is a sale of the estate of Morgansen's, and you can't have anything else in that sale except for the estate of Morgansen's.

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THE COURT: I represented one of the largest fine guild jewelers in the United States operated under the name of Schrieve, Kremper and Lowe in Boston, Schrieve & Co. in San Francisco, and a number of different names in different places around the country. And there was a section in the store, and we talked about these as the ladies on the Hill, and we could not mess with the ladies on the Hill. This was Beacon Hill.

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Because this company had been operating for over 100 years those were estate sales, and they were separately demarcated and put in a different part of the store so that when I came in, I could have bought a diamond ring for my girlfriend and I wouldn't know whether they were consigned or not.

25

I could also go to the estate section and buy

1 some bowl or china or brooches or other articles that the
2 ladies on the Hill liked to wear or have in their
3 possession. And when their trust funds began to run out,
4 they had to start liquidating their estates.

5 There was also included in that, actual estates
6 where the persons entered into arrangements with Schrieve
7 were fiduciaries of probated estates. So it was either the
8 little ladies on the Hill or the estates. And they were
9 separately demarcated because the inventory was very
10 different.

11 Now, you are telling me if I were to walk into
12 Morgansen's as a potential customer, purchaser, I would look
13 at a display case that would have inventory that she had
14 purchased. There would also be those good that you believed
15 were on sale or return, and they wouldn't be separately
16 distinguished particularly if she sold antiques and other
17 objects and they weren't new items. In fact, she had new
18 items, old items, and everything in between.

19 MR. ACKERMAN: And everything was all together
20 in the store. We have the auctioneer here you actually was
21 at the premises and who secured the premises and who has
22 gone to the premises and let people inspect the property.
23 And he will tell you what he told me. Everything was all
24 together.

25 THE COURT: That's an evidentiary matter. So

1 it's not just about my perceptions or recollections or
2 yours. If this becomes a threshold issue, then we would
3 have to have an evidentiary hearing in which Mr. Maltz is
4 the person who would be called. He'll testify, and he will
5 be subject to cross examination. I think that's best done
6 through some representative, so there aren't 20 people
7 jumping up and asking Mr. Maltz questions with respect to
8 oh, did you see my thing.

9 MR. ACKERMAN: There were other things. By the
10 way, that was exactly what was going on. I think that's my
11 thing. I don't know. But there were other things.

12 THE COURT: And then there were presumably
13 sales of goods on sale or return where the proceeds weren't
14 remitted.

15 MR. ACKERMAN: Precisely. In fact that was one
16 objection; and there were many, many people who called me
17 about that.

18 THE COURT: Okay. So if there were goods that
19 were converted or there were proceeds that were converted
20 and weren't properly accounted for that then gives rise to a
21 claim against the estate.

22 MR. ACKERMAN: Correct.

23 THE COURT: And those would be unsecured
24 claims would they not be?

25 MR. ACKERMAN: Yes.

1 THE COURT: And someone might have a claim and
2 the only question is if they are valid and subsisting lien
3 claims in favor of the estate, and those liens are not
4 defeasible, then obviously the Trustee will look into that.

5 MR. ACKERMAN: Yes. I will also say one thing,
6 Judge --.

7 THE COURT: And under those kinds of
8 circumstances if these goods were sold and the proceeds
9 would have to first cover the cost of sale administration
10 and be paid to secured creditors, and then the balance would
11 be distributed to the holders of allowed unsecured claims.
12 Correct?

13 MR. ACKERMAN: Yes. All in accordance with law
14 under your approval, Judge, there has to be a notice of
15 hearing.

16 THE COURT: All right. Okay.

17 MR. ACKERMAN: I want to point out that there
18 are several people here who I don't recall the name. Give
19 me one second, Judge. I just want to say this. Mr.
20 Goldberg and other people -- Mr. Goldberg is here I believe,
21 but other people have called me. There are definitely
22 questions about monies and properties which are missing.
23 There are other things that I didn't want to put on the
24 record right now. We are tracking cash; and if we find any
25 evidence of a bankruptcy crime whatsoever, we shall be

1 reporting that. We may make appropriate motions before the
2 Court. We shall be reporting that to criminal authorities,
3 and we may make motions that other locations are property of
4 the estate.

5 THE COURT: All right. I want you to
6 understand some of you, that Mr. Ackerman acts in a
7 fiduciary capacity subject to very tight standards. He has
8 been at this for a very long time. He is one of most
9 experienced Trustees. He is also one of our best commercial
10 lawyers, and it is his obligation to protect to the fullest
11 extent possible the unsecured creditors. Secured creditors
12 can generally take care of themselves. He doesn't need to
13 help the State of New York. They have enough remedies in
14 place, and he may determine that some of these liens could
15 be avoided or reduced. Under those kinds of circumstances,
16 it is fully in your best interests to report to him any
17 information you have that may lead to a criminal
18 investigation. He is not your enemy. He is independent.
19 He represents basically the class of creditors who hold
20 allowed unsecured claims, and his statutory goal is to
21 cooperate with the creditors take information from them, try
22 to assist them in a collective capacity, and to try to
23 maximize the proceeds.

24 His compensation as Trustee is a function of the
25 distribution he makes to the creditors. So if he doesn't

1 make any distributions, he doesn't get any commissions.

2 So, it is obviously to your interest to cooperate
3 with him. These are difficult factual issues to sort out,
4 particularly in the absence of full records.

5 Because the other problem is that the more he has
6 to spend investigating these claims or actions, the higher
7 the administrative expenses are. The more litigation, the
8 more legal fees are going to be incurred by the Trustee. So
9 it is always desirable to try to resolve these matters short
10 of full blown litigation because that's expensive for the
11 estate. It's a burden on the unsecured creditors of allowed
12 claims, and it is a very substantial burden on individuals.

13 We are not dealing with large corporations here
14 who are creditors of the estate. We are dealing with
15 individuals who may have family heirlooms, they may be
16 investors in certain art objects, they may be in the business
17 of their own character, but we are not dealing with national
18 or regional creditors. There is no one creditor here who is
19 unsecured and is the principal source of supply to this
20 business. Many of you are local residents.

21 All right. Go ahead.

22 MR. ACKERMAN: Indeed, Judge, a lot of the
23 creditors have been incredibly helpful in that way.

24 THE COURT: All right. Okay.

25 MR. ACKERMAN: That's the way we found out about

1 other locations.

2 THE COURT: When you say other locations, you
3 mean some of the inventory may have been diverted?

4 MR. ACKERMAN: I don't want to say for the
5 record, Ms. Brunesco might have -- I don't think she's here,
6 but let's just say I'm scheduling another examination
7 because of some things creditors have told me and shown me.

8 THE COURT: Okay.

9 MR. ACKERMAN: There was someone who pointed out
10 a very curious question to me. Why is it called
11 Morgansen's? Well there is a reason why we think now.

12 THE COURT: All right. Going on.

13 MR. ACKERMAN: What we believe is the case is as
14 follows.

15 THE COURT: What section are we in.

16 MR. ACKERMAN: We were looking over 9-102 (A)
17 (20).

18 THE COURT: All right. A merchant deals in
19 goods of that kind under a name other than a name of the
20 person making delivery is not an auctioneer and 3 is not
21 generally known by its creditors to be substantially engaged
22 in the selling of goods of others. That's again a fact
23 dispute, correct?

24 MR. ACKERMAN: But I think that probably
25 Verizon and other trade utilities --

1 THE COURT: What's that?

2 MR. ACKERMAN: Verizon, excuse me, any gas
3 creditors, all of these utilities which have turned off
4 services and all of that never knew.

5 THE COURT: They never knew that she was
6 selling the goods of others?

7 MR. ACKERMAN: Yes, Judge, and indeed here is
8 another interesting question. According to Ms. Brunesco,
9 now, the SBA is a creditor of the debtor. A huge amount of
10 debt.

11 THE COURT: Never listed before?

12 MR. ACKERMAN: Never listed before. \$250,000.
13 Now, I have my suspicions about this, and we are
14 communicating with the SBA, but they have no idea that this
15 is an auctioneer. The reason why I have my suspicions --

16 THE COURT: Well, you did a lien search
17 against Morgansen's. Did you come across other filings in
18 favor of the SBA?

19 MR. ACKERMAN: Nothing, and I have never heard
20 of the SBA ever lending money to a company without taking a
21 security interest. That is why we are in communications
22 with them.

23 THE COURT: All right.

24 MR. ACKERMAN: But it was shocking to hear, oh,
25 I forgot. There's a \$250,000 secured claim.

1 THE COURT: Okay. All right. Which
2 presumably she personally guaranteed.

3 MR. ACKERMAN: Yes.

4 THE COURT: All right. So you'll look into
5 that. So that takes us through 20. We have identified some
6 of these issues. And the other thing is what does it mean
7 to be not generally known? Not generally known to the
8 majority of creditors?

9 MR. ACKERMAN: Under 2-326 (3), the old one,
10 which has been removed, there were cases which were saying
11 that if 85% knew, that wasn't good enough.

12 THE COURT: So I have to construe the words
13 generally known and not generally known.

14 MR. ACKERMAN: It's kind of like section 303,
15 Judge, I believe with respect to not generally paying their
16 debts as they become due, one of your standards for an
17 involuntary filing. It is always a question about what if
18 you are paying all of your creditors except for one large
19 one or what if you are paying the large one and not the rest
20 of them, which is small.

21 THE COURT: All right. So I can rely upon
22 another provision of the Bankruptcy Code that tracks this
23 for analogous case law.

24 MR. ACKERMAN: And I think another provision of
25 the Code which is incredibly relevant here is Section 544

1 which gives me the right of a hypothetical lien creditor.
2 If I would have walked into that place, I would never have
3 known. And If I had gotten a lien against Morgansen's, I
4 would never have known,

5 THE COURT: For a hypothetical lien creditor,
6 you don't walk in. You don't know anything.

7 MR. ACKERMAN: I just get a lien. You're right.
8 Sorry, Judge.

9 THE COURT: All right, Okay. So, go on.

10 MR. ACKERMAN: All right. 9-102 (a)(20) would
11 say either

12 THE COURT: Good morning Mr. Bilich. You
13 should never let your partner get up. Is he doing all
14 right?

15 MR. BILICH: There's no stopping him.

16 THE COURT: Go ahead.

17 MR. ACKERMAN: Let's suppose it's not an
18 auctioneer. We would go then Judge if I may invite your
19 attention to 9-103 (d).

20 THE COURT: B as in boy?

21 MR. ACKERMAN: D as in David. I apologize.

22 THE COURT: 9-103. Okay.

23 MR. ACKERMAN: And that says that security
24 interest of a consignor in goods that are subject of a
25 consignment is a purchased money security interest --

1 THE COURT: Wait a minute. Consignor's
2 inventory purchase. The security interest of a consignor in
3 goods that are subject of a consignment is a purchased money
4 security interest in inventory.

5 MR. ACKERMAN: Now, how do we perfect a PMSI?
6 If I may invite your attention then Judge to 9-324.

7 THE COURT: 9 what?

8 MR. ACKERMAN: I apologize. 9-324.

9 THE COURT: Okay. This is the priority rules
10 on purchasing a securities interest.

11 MR. ACKERMAN: Yes, Judge. 9-324 subsection a
12 of that provision sets forth that the purchased money
13 security interest must be perfected within 20 days of
14 delivery.

15 THE COURT: I thought there were purchased
16 money security interests in consumer goods that didn't
17 require a public filing.

18 MR. ACKERMAN: That would be like a refrigerator
19 sold by Sears to an individual. This is -- I don't think it
20 would provide where it pertained items given to us or a
21 store which was selling jewelry, antiques, things of that
22 nature. How in the world would a third party know.

23 THE COURT: One of the stumbling blocks in
24 this when I began to review this was what is a consumer good
25 because if it's a consumer good, it gets treated

1 differently. Then you have to go to the definition of what
2 is a consumer good. If I have a painting by some lesser
3 known artist that an art appraiser would say was worth
4 \$5,000, is that a consumer good? Is it something that I
5 would use in my household by putting in on the wall or
6 hanging things does not constitute use.

7 MR. ACKERMAN: I think there Judge that we would
8 look.

9 MR. BILICH: I apologize. We just established
10 that this consignor's interest isn't an interest in
11 inventory.

12 THE COURT: You have to decide what inventory
13 is, and there is a category of inventory under consumer
14 goods.

15 MR. BILICH: I think in the co-inventory and
16 goods are different terms.

17 THE COURT: Wait. There is a category of
18 goods. Then there are sub-categories under goods. Right?
19 And the sub-category under goods is consumer goods. That's
20 just one of them.

21 MR. BILICH: Please go back to the definition we
22 were looking at 9-102 20. The consignment definition in
23 Article 9 specifically excludes consumer goods from the
24 definition of a consignment transaction.

25 THE COURT: I understand that. So we need to

1 know what consumer goods to determine whether they should or
2 shouldn't be excluded. All I have is a category. I don't
3 know what it substantiates said variable.

4 MR. BILICH: But if they are consumer goods, the
5 consequence is that Article 9 doesn't apply to our
6 situation.

7 THE COURT: I understand that, but it seems to
8 me that at first blush some of these items may be treated as
9 consumer goods.

10 MR. ACKERMAN: What I was thinking he was
11 saying. I apologize Judge, I didn't speak into the
12 microphone.

13 THE COURT: What's the definition of consumer
14 goods?

15 MR. ACKERMAN: Before I point --

16 THE COURT: Look, answer my question. Then we'll
17 go to yours.

18 MR. ACKERMAN: Done. Sorry. Let's go to
19 Section 9-102 (23) and (24).

20 THE COURT: 9-102 (23) says consumer goods
21 means goods that are used apart from use primarily for
22 personal, family or household purposes. So if I look at this
23 category of goods that were on the shelves in Morgansen's,
24 why could I not conclude that most of those items would be
25 treated as consumer goods. They are going to be used in

1 households. If she is selling in private sales goods to
2 interior decorate, then that's just homeowners on the East
3 End redecorating their homes and that includes certain art
4 objects that are going to be put on the wall or china or
5 other goods that would be put in display racks in homes.
6 What do they call them? There's a word for them.

7 MR. ACKERMAN: Etageres.

8 THE COURT: What's that?

9 MR. ACKERMAN: Etagere.

10 MALE VOICE: Vitrine.

11 THE COURT: What's that?

12 MALE VOICE: Vitrine. It's kind of a showcase.

13 THE COURT: How do you spell it?

14 MALE VOICE: Vitrine.

15 MR. ACKERMAN: Vitrine.

16 THE COURT: What I'm thinking about is you go
17 into someone's living room and they have this wall-sized
18 unit that has lighting and they are basically display
19 cabinets for valuable objects. It could be a collection of
20 eggs, whatever they call those things. It could be a
21 collection of porcelain. It could be a collection of
22 perfume bottles, and they often have locks to them. You
23 switch on the lights, and you display it to your guests some
24 of your priceless possessions. So if I have one of these
25 things that is 8 feet tall, 16 feet wide and has about six

1 shelves on it all built with a display, what is the thing
2 that holds these items called? Is it an etagere or is it
3 something else. You might call it a china closet, but it
4 holds more than china. Someone of the floor says that it
5 is a vitrine. Look at what we are going to learn here.
6 Okay.

7 But the question is are those things on display
8 in a household consumer goods?

9 MR. ACKERMAN: That's the interesting part,
10 Judge.

11 THE COURT: But this is not new news.

12 MR. ACKERMAN: No I'm saying this. If -- when
13 they went to Morgansen's, either you say it was either a
14 consignment; ergo, it is governed by 2-326 or you say
15 Morgansen's was buying it, in which case it is not a
16 consumer good. It has to be for resale Judge. It was given
17 to Morgansen's as a consignment.

18 THE COURT: So you're telling me I have to
19 look at the perspective of Morgansen's. I'm not going to
20 look at the item itself.

21 MALE VOICE: Judge, can you repeat when he said,
22 please?

23 MR. ACKERMAN: I apologize. What I believe is
24 the transaction -- if you are a creditor, you see goods
25 there, and when we are defining this, if a consignor urges

1 that he was selling it to the public, then it was a
2 consignment, and it is governed by 2-326. If he was selling
3 it to Morgansen's notwithstanding that it was called
4 consignment --

5 THE COURT: I think you are evading the
6 question. No, no, it's not selling to Morgansen's. It's
7 on a sell or return basis. The understanding is that
8 Morgansen's is basically a broker for a fee. And what they
9 are selling is items that will end up in people's homes.
10 Maybe some of them will end up in businesses, in the
11 lobbies, in the entryways; but for the most part, if the
12 ultimate purchasers are going to be persons who would hold
13 them in their homes for personal use or display, you're
14 telling me that I don't look at the end result. I simply
15 have to look at this as between the person who brought it
16 there on a sell or return, called a consignor, and
17 Morgansen's, and I don't look at who the ultimate purchaser
18 is.

19 MR. ACKERMAN: That is exactly what I believe,
20 Judge, what 2-326 (2) teaches us. That's why --

21 THE COURT: I thought it taught us that if it
22 is a consumer good, you take it out of that statute.

23 MR. ACKERMAN: I don't believe so, Judge. If I
24 may, I invite your attention to 2-326 (2).

25 THE COURT: It just says who are the creditors.

1 It doesn't tell you --

2 MR. ACKERMAN: It says they are subject to the
3 claims of the creditors while in the buyer's possession.

4 THE COURT: Yes.

5 MR. ACKERMAN: While in Morgansen's possession;
6 that's exactly the lesson. That's why 2-326 governs.

7 THE COURT: Okay, but you know it seems kind
8 of intuitive, and here are persons who basically turned over
9 and delivered goods for resale and they are going to get the
10 proceeds; and if he doesn't sell it within a certain agreed
11 period of time, they have the right to take it back. And
12 under those circumstances, if it is going to be held for
13 resale to consumers, then I don't understand why the things
14 on the shelves don't maintain their status as consumer
15 goods.

16 MR. ACKERMAN: It might not be sold to
17 consumers, as you stated. Ms. Brunesco was testifying that
18 she had a wide variety of merchants that would buy from her
19 and they would resell it to other entities.

20 THE COURT: Okay, but what you're telling me
21 is I have to look at her business function. I don't look at
22 the object itself.

23 MR. ACKERMAN: We look at that and we look at
24 what the creditor would be thinking.

25 THE COURT: What?

1 MR. ACKERMAN: We look at what a creditor would
2 know; a hypothetical creditor.

3 THE COURT: Okay. Put me back to Schrieve,
4 Krump, and Lowe. I am in the estate section of the store.
5 I look at something, and I want to buy it. I want to use it
6 on special occasions; when my Great-Aunt Tillie comes over.
7 I want to show that I reached a certain level of
8 respectability. So I pull out my china. I have a big
9 Armoire that we use for storing our china from my wife's
10 great grandmother; and every time we move, I imagine to
11 break more of it. We haven't used it 6 ½ years since we've
12 been here, but it's there. It's of great sentimental value.
13 It's in my living room. If I said, I need liquidity to pay
14 my taxes and I then bring them to someone who deals in goods
15 of this kind under his or her own trade name, and I have
16 expecting to be paid, and I don't really care where it goes,
17 whether it goes to another broker, another dealer, an
18 interior decorator. It gets put up on the wall in some
19 restaurant like the Three Village Inn. I just want the
20 money. But I know ultimately that it is going to end up
21 somewhere; and it may be in someone's home or it may be in
22 someone's business.

23 So you're telling me I don't look at the actual
24 outcomes. I don't look at who the customers are. In the
25 end the customers determine whether they are consumer goods.

1 They don't have any use. They have no use other than to be
2 used as decorative objectives and a great majority of these
3 things are going to be in people's homes.

4 If that's the case, why aren't they consumer
5 goods.

6 MR. BILICH: I think there is a misconception
7 here in one respect.

8 THE COURT: Clear it up.

9 MR. BILICH: First of all, 2-326 section that
10 we think governs this doesn't distinguish between consumer
11 goods and non-consumer goods, and so I would submit that the
12 issue that we are talking about to the extent that 2-326
13 governs --

14 THE COURT: The problem is we can't bracket
15 everything under 2-326. 2-326 has to be read in a wholistic
16 fashion in connection with other definitional sections and
17 other sections of the code.

18 MR. BILICH: Let me make one other point.

19 THE COURT: I don't just read 2-326 on its own
20 bottom and ignore all the other provisions.

21 MR. BILICH: Let me make one other point which
22 may or may not be clear. The definition that we have been
23 looking at in 9-102 (20) the definition of consignment. The
24 purpose of that definition serves is to draw a distinction
25 between two types of consignments. One type of consignment

1 if it is within the definition, it's governed by the rules
2 of Article 9; and to the extent that you have a consignment
3 that is not governed by Article 9 because the consignee is
4 an auctioneer, because the consignee is known to deal in the
5 goods of others because the goods involved are consumer
6 goods to the extent that you have a consignment within the
7 carve-outs from Article 9. The only consequence to that is
8 that Article 9 does not govern the issue that we are talking
9 about, and you have to look at some other law to govern that
10 situation.

11 THE COURT: You mean it falls outside of the
12 code.

13 MR. BILICH: No outside of Article 9.

14 THE COURT: If it is outside of Article 9, is
15 it under Article 2?

16 MR. BILICH: I believe so.

17 MR. FAVER: Your Honor?

18 THE COURT: You will have plenty of
19 opportunity to explain your position.

20 MR. FAVER: The answer to your question in the
21 code Judge.

22 THE COURT: Thank you.

23 Go ahead Mr. Bilich.

24 MR. BILICH: So, all I want to point out is
25 that the definition of consignment --

1 THE COURT: Counselor, every question I have
2 before me is in the Code under the Bankruptcy Code, the UCC.
3 The problem is just because it is there, it doesn't exactly
4 explain itself. And if it has terms of reference, we have
5 to chase other sections. I don't think there is any case
6 under the UCC where the answer doesn't require you to look
7 at least eight to ten definitional provisions and other
8 sections. So you have to continue to string these things
9 together in some coherent whole and it is a art form of
10 analysis. This was supposed to regularize or normalize
11 business transactions so we didn't have disputes over legal
12 issues, and the UCC has failed in that regard, and it is now
13 so complicated that we are forever litigating these matters.
14 There are no clear rules in the UCC in transactions of this
15 character. These transactions are in the margins of the
16 law, and that's our problem, because they can be
17 recharacterized several different ways.

18 Okay Mr. Bilich, you are going forward. You're
19 telling me if they are consumer goods, they'll fall outside
20 the scope of Article 9, so we're not dealing with purchased
21 money security interest and whether they are perfected or
22 unperfected. Correct?

23 MR. BILICH: Right. And then you have to look
24 at some other law other than Article 9; and the last point I
25 want to make --

1 THE COURT: But there are two alternatives.
2 One is that I have to go to common law or applicable non-UCC
3 law, the law of bailments, the law of sales, common law
4 stuff that isn't codified, because it really does not have a
5 commercial application or I have to go to 2-326.

6 So, there are two options. If it's out of 9.
7 Then it's either in 2 or out of 2; and if it is out of 2 and
8 out of 9, it is nowhere under the UCC. So I have to look to
9 state law principles. Correct?

10 MR. BILICH: Yes.

11 THE COURT: Generally referred to as common
12 law. But there could be specific statutes.

13 MR. BILICH: Or statutory law.

14 THE COURT: There could be case law or
15 particular provisions or special provisions of the state law
16 in the State of New York.

17 MR. BILICH: Or statutory law; other statutory
18 law.

19 THE COURT: I understand, but you are telling
20 me that you believe that if they are consumer goods. Your
21 position is it can't be consumer goods because of the
22 arguments made by Mr. Ackerman?

23 MR. BILICH: My position is that if they are
24 consumer goods, Article 9 does not apply.

25 THE COURT: I got that part.

1 MR. BILICH: I believe Article 2 applies which
2 does not distinguish between consumer goods and non-consumer
3 goods.

4 THE COURT: Yes. Then why would I be going to
5 9-102?

6 MR. BILICH: 9-102 (20) defines which types of
7 consignments are governed by Article 9.

8 THE COURT: So you're telling me I can't use
9 9-102 (20) to determine the scope and the applications of 2-
10 326?

11 MR. BILICH: That is correct.

12 THE COURT: So that definition is only good
13 for Article 9. You can't use it to construe an apply it to
14 2-326. Is that your point?

15 MR. BILICH: Yes.

16 THE COURT: I finally got it. Thank you.

17 MR. ACKERMAN: And in that vein, Judge, there
18 were cases --

19 THE COURT: Oh, it's tag team time.

20 MR. ACKERMAN: I'm sorry. In that vein, Judge,
21 there were cases decided in the application and notice which
22 we should precisely talk about that. If I may invite your
23 attention to Page 4 of the notice. I can find it in the
24 application.

25 THE COURT: This is the first time I have seen

1 a notice to creditors that constituted a brief.

2 MR. ACKERMAN: I know. I didn't know what else
3 to do here Judge. I wanted everybody to have their best
4 understanding.

5 THE COURT: I don't think they have the same
6 fascination that you do. You seemed to get a real kick out
7 of writing this. So on Page 4, you are reciting which
8 cases?

9 MR. ACKERMAN: It would be in the third full
10 paragraph, Judge, and they are re: Corvette Collection of
11 Boston, Inc. 294 BR 409.

12 THE COURT: That's the District of
13 Massachusetts?

14 MR. ACKERMAN: That's the Southern District of
15 Florida.

16 THE COURT: And who decided that.

17 MR. ACKERMAN: I believe, Judge Paske, Judge.

18 CLERK: He's in the Middle District. Judge
19 Paske.

20 MR. ACKERMAN: Then I am not sure. I apologize,
21 Judge.

22 THE COURT: So that is the cite. That's a
23 fairly recent case?

24 MR. ACKERMAN: Yes, it is 2003.

25 THE COURT: Go ahead.

1 MR. ACKERMAN: And the quote from that is
2 pursuant to Section 544 (a) of the Bankruptcy Code all goods
3 held by the debtor --

4 THE COURT: What?

5 MR. ACKERMAN: All goods held by the debtor on the
6 sale or return basis under UCC 2-326 becomes assets of the
7 bankruptcy estate.

8 That's the only, only, only case I found on 2-326
9 as amended--the only cases.

10 THE COURT: Well they can become assets of the
11 estate. The question is are they subject to third party
12 claims? A property that is mortgaged can become property of
13 the estate. That doesn't vesiuate the lien of the
14 mortgagee. And your point here is that this isn't about
15 liens, it's about ownership.

16 MR. ACKERMAN: I believe first it is about
17 ownership.

18 THE COURT: Do you understand the concept of
19 ostensible ownership?

20 MR. ACKERMAN: Yes.

21 THE COURT: Okay. What does that mean?

22 MR. ACKERMAN: I think what you are talking
23 about is how it is viewed by third parties and whether other
24 parties would look at it, how someone is holding it; whether
25 they hold legal title as opposed to equitable title.

1 THE COURT: So, you are suggesting that in
2 this case, Ms. Morgansen isn't one who is the ostensible
3 owner; she is the actual owner?

4 MR. ACKERMAN: Morgansen's Inc. is the legal
5 owner of this property or the bankruptcy estate of
6 Morgansen's Inc. I should say.

7 THE COURT: Is the actual owner?

8 MR. ACKERMAN: Yes. Subject to third party
9 claims as they can prove they have filed and they have
10 perfected, subject to the voidance provisions of the
11 Bankruptcy Code.

12 THE COURT: As to the persons who delivered
13 these goods for resale for the right of return, you are
14 telling me that once they turn over these goods to a
15 merchant, if that merchant conducts business, then the
16 insolvency risk is going to be borne by the persons who
17 delivered the goods because they can't exercise their right
18 of return once it comes into the bankruptcy estate. Is that
19 your point?

20 MR. ACKERMAN: I would say that except in the
21 case of a discrete auctioneer, Judge, that only, only sells.

22 THE COURT: I'm talking about a merchant not
23 an auctioneer.

24 MR. ACKERMAN: A merchant that is selling
25 unsegregated goods when the goods are unidentified, yes.

1 THE COURT: Okay. So it's the person that
2 delivers on sale or return who must be on notice, must make
3 sure that the companies they're dealing with continues to
4 meet their on-going expenses and doesn't head for
5 bankruptcy.

6 MR. ACKERMAN: Yes, and Judge I would add this.
7 If there were UCC's on file, I would urge you to recognize
8 the UCC's. I invited in my notice that people file any
9 UCC's because the searches I do are sometimes wrong. And as
10 I made note to chamber, I would have definitely argued that
11 anyone with a UCC had a security interest.

12 THE COURT: All right.

13 MR. ACKERMAN: Another section I would invite
14 your attention --

15 THE COURT: I'm a little concerned about some
16 of the commentary seems to draw a distinction with respect
17 to diamonds and paintings.

18 MR. ACKERMAN: Yes.

19 THE COURT: Now I assume that if I had
20 disposable wealth and I wanted to stay out of stocks and
21 bonds and real estate investment trusts based upon some
22 misconception, that I would invest in industrial grade or
23 better grade diamonds, and I might have a bag of these in my
24 safety deposit box. I could have a collection of gold
25 Kugerands or I could have a collection of other metallic

1 substances when melted down would enhance certain value. If
2 I thought the price would continue to go up or the price of
3 silver was going to continue to go up, or the price of
4 diamonds that can be cut into stones for domestic purposes
5 for diamond rings, pendants, and things of that nature, if
6 that is how I wanted to hold my wealth, would that give rise
7 to certain distinction.

8 MR. ACKERMAN: I don't know that distinction,
9 Judge, but I do know this --

10 THE COURT: Well, what's the difference
11 between having value or wealth in diamonds as opposed to
12 value or wealth in very old, well maintained china?

13 MR. ACKERMAN: Judge, if I believed this was a
14 jewelry store where everything was put together and not
15 segregated as you represented one entity that has segregated
16 goods, there would be no -- this issue wouldn't even exist.
17 It would just be, of course, as the property of the estate.
18 If they were not segregated and no one could tell -- if the
19 creditors could not tell whose jewelry was whose --

20 THE COURT: What are the major disputes in New
21 York. It's well-known to every bank's practitioner. It is
22 that the diamond industry doesn't operate on memoranda. In
23 the case in which I represent Schrieve, the creditor's
24 committee was made up of diamond merchants, and they never
25 put anything in writing because that's not the way the

1 industry operates. So the answer to them was well, that's
2 maybe the way you operate, but you are still bound by the
3 same law; and even though there are millions of dollars of
4 diamonds that are being traded and held under various
5 arrangements, you are still bound by the terms of the law.
6 And this always created consternation because these people
7 said wait a minute, we have been dealing with these families
8 for generation. We are all part of the same religious and
9 social community, and you can't impose alien law as it were
10 on us, and we would say, sorry. That's not the way it plays
11 out. Have you ever had cases involving diamond merchants as
12 a Trustee?

13 MR. ACKERMAN: Yes.

14 THE COURT: And the diamond merchant says well
15 those are my diamonds, and you say, sorry.

16 MR. ACKERMAN: Yes.

17 THE COURT: And you have litigated those kind
18 of issues to judgment?

19 MR. ACKERMAN: There were people who came to
20 court to argue. I was Trustee in Marty Jewelry Corporation
21 and its many offspring because they would file and they
22 would refile and refile, and people would come in and argue
23 that the jewelry belonged to them, and they could not prove
24 that it was segregated and the answer was to sell it. They
25 have a claim.

1 THE COURT: But these resulted in reported
2 decisions?

3 MR. ACKERMAN: I don't know of any reported
4 decisions in the cases. There wasn't an issue.

5 THE COURT: Well I just know because of the
6 extent and magnitude of the diamond industry and the way
7 they practice business that there have been a number of
8 instances in which the Bankruptcy Court is swept into that
9 vortex, and I would have assumed that because this is a
10 situation that so frequently occurs in New York that there
11 would be a reported decision.

12 MR. ACKERMAN: I know there is one expressed
13 provision in New York law about a special type of object;
14 that is, art drawn by the original artist, and that is
15 protected; however, none of the art here was original.
16 That's why I made that clear in this notice. If it was
17 drawn by the original artist, then please tell us. I don't
18 know.

19 THE COURT: All right. Okay. So this is your
20 essential position.

21 MR. ACKERMAN: Your Honor, I do want to put on
22 the record if there is art and they can show that they were
23 the original artists, then I would say that it would be
24 excluded. I did not know.

25 THE COURT: That would be under New York law.

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MR. ACKERMAN: Yes, Judge.

THE COURT: What else do you have to say.

MR. ACKERMAN: I would invite the Court's attention to one other provision 2-403. Interesting goods to others can convey good title. That is the whole essence.

THE COURT: That's where you go to a jewelry repair shop that also sells jewelry. You go to bring your watch to a trusted jewelry repair man and he also sells watches of the same character right out of the same display tables.

MR. ACKERMAN: I think what it says is that what was the power of the transferor.

THE COURT: Any entrusting or possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entrustor to a buyer in the ordinary course of business.

MR. ACKERMAN: Now we look at 11 USC 544.

THE COURT: And then it defines a entrusting, right?

MR. ACKERMAN: Correct.

THE COURT: So where does 2-403 take me. Is it your position that some of these persons entrusted their goods.

MR. ACKERMAN: Well, I'm saying that a lot of

1 people are arguing that it shouldn't be governed by 2-326.
2 They're saying we really entrusted the goods. It's an
3 agent/principal relationship or something of that nature.
4 But New York UCC governs that. New York UCC and the
5 Bankruptcy Code together would govern that. You can convey
6 good title. Morgansen's can convey good title and under 11
7 USC 544, a hypothetical judicial lien creditor, the Trustee
8 acquires the rights -- excuse me, of a hypothetical judicial
9 lien creditor, et cetera, et cetera, and would be such
10 people.

11 THE COURT: Would what?

12 MR. ACKERMAN: Would prevail over the buyers of
13 those persons would prevail over --

14 THE COURT: So these are the customers of
15 Morgansen's. We are talking about the suppliers.

16 MR. ACKERMAN: What I am just simply saying as
17 to those people arguing it is -- even though the agreement
18 was called a consignment agreement, every single one, they
19 are saying forget the name of the agreement, we entrusted
20 the goods.

21 THE COURT: But we are not talking about the
22 customer. We are talking about persons who delivered goods.
23 We are not talking about the power of Morgansen's to convey.
24 We are talking about what rights any of these persons who
25 deliver these goods on a sale or return basis have to

1 recover the goods against the Trustee.

2 MR. ACKERMAN: Well, I think under 544 (a),
3 while the goods are in Morgansen's possession, a
4 hypothetical judicial creditor could have grabbed those
5 goods.

6 THE COURT: But it's not an entrusting
7 situation.

8 MR. ACKERMAN: I don't think it is. Every
9 agreement says consignment agreement. How can you not say
10 that it is 2-326?

11 THE COURT: Okay. So that's your position
12 effectively?

13 MR. ACKERMAN: Yes, Judge.

14 THE COURT: And what is it that you are asking
15 for the Court to authorize a sale. We are now in October.
16 You're talking about seasonality. I know it took us a while
17 to tee this up for a hearing, and we didn't convert this
18 case to Chapter 7 until the summer, late summer. So, is
19 timing critical for goods that are not perishable?

20 MR. ACKERMAN: Yes, Judge. Timing is critical.
21 The end of the Hampton season is coming.

22 THE COURT: How long do you think that season
23 lasts.

24 MR. ACKERMAN: At the most, as far as I
25 understand for another 20 days. I'm looking at the

1 auctioneer. By the end of October, Judge.

2 THE COURT: How are we going to get all of
3 this done, cut through all of this stuff and authorize an
4 auction to be held by the end of October. Is that
5 sufficient time to properly publish this, to dredge up
6 business? I mean it's awfully miserable out this week. It
7 would have been nice if we had the continued weather, and we
8 had a nice Indian Summer, but it looks like we have lost the
9 Indian Summer this week.

10 Maybe the last two weeks in October are going to
11 be glorious, and the trees will have turned, and everyone
12 will be going out to the North Fork or to the south Fork to
13 get their last breath of fresh air, and it will be a festive
14 thing and maybe there are other activities that are
15 scheduled for October that would draw tourists, but Ms.
16 Morgansen's testimony on several occasions was that the
17 majority of her business was conducted over the telephone
18 with interior decorators and other persons of that sort.

19 While there were people who would traipse through
20 the store, a substantial part of her business was conducted
21 over the phone or in connection with on-site sales by way of
22 auction.

23 MR. ACKERMAN: One of the aspects of relief that
24 we are asking for Judge is authorization to conduct -- to
25 publish the Notice of the Sale in various entities and

1 expend up to the sum of \$7,500. We would advertise in the
2 New York Times definitely, I think in Newsday, and certainly
3 in the local newspaper. We are also going to put it on the
4 internet.

5 THE COURT: Look, if I want to sell certain
6 items, obviously of value, I am not sure I want to incur the
7 expense of a New York Times ad. There must be some
8 opportunity in connection with trade shows, in connection
9 with other highly marketed events. I don't know why it has
10 to be out on that part of the Island. If I had valuable
11 goods of this sort, maybe I would want to open up a booth in
12 Manhasset during the Christmas sale. Why wouldn't I want to
13 do this in connection with some place of business where
14 there is going to be an awful lot of traffic of persons who
15 live a hell of a lot closer to that location than they do
16 out on the East End.

17 MR. ACKERMAN: What I've been told and I'm
18 trying to get the auctioneer in here is that it would cost a
19 significant amount to move these items in the sum of maybe
20 \$20,000 to \$50,000.

21 THE COURT: Well if you could maximize sales,
22 that's one of the costs you have to take into consideration
23 and requires the Trustee's business judgment in consultation
24 with an auctioneer. But if people aren't traipsing out to
25 the location where these goods are held, and the weather is

1 adverse, it seems to me that it might be more sensible to
2 sell it in Nassau County or in Manhattan during some
3 discrete period of time to bring in more traffic, if that is
4 the way this stuff gets sold. If the principal customers are
5 interior decorators who attend these auction sales or estate
6 sales or anything else of that sort, there may be other
7 shows that they attend, at the pre-Christmas period of time
8 to start stocking up their shelves.

9 MR. MALTZ: Good morning, Judge, David Maltz,
10 the auctioneer. We thought about moving the items. The
11 cost associated with doing that would be so high, we would
12 have to worry about breakage, location, and I feel if we get
13 an auction in before the end of this months, we still have
14 the season out there that we can get it done as long as it
15 is properly advertised and marketed.

16 THE COURT: You're the only one with a tan Mr.
17 Maltz. I don't know if it is local or you go to the tanning
18 salon, or you go to Florida.

19 MR. MALTZ: I work outside a lot Judge.

20 THE COURT: Okay, I understand that.

21 MR. MALTZ: I like planting flowers with Mr.
22 Stern.

23 THE COURT: Okay, so in any event --

24 MR. MALTZ: I do have pictures of the premises.
25 I don't know if the Court has seen any of them, and I would

1 be happy to pass them up to you if you have any interest.

2 THE COURT: I'm not going to be making a
3 decision about where this stuff should be sold. That is up
4 to the Trustee in consultation with his experts. And I just
5 asked this more than out of mild curiosity, because the goal
6 of Mr. Ackerman is to maximize the proceeds; and the more
7 proceeds there are, perhaps the easier it is to deal with
8 some of these persons in court today. Because if you are
9 putting real money on the table, and they are going to get a
10 decent distribution, they may determine that it is better to
11 take those proceeds with the sale that you are proposing to
12 hold brings in substantial revenues. But I don't know what
13 experience you had in auctioning goods of this character.

14 MR. MALTZ: We have had experience selling
15 similar items, and I discussed it at length with Mr.
16 Ackerman the costs associated with relocating these goods
17 either into Nassau County or even into Manhattan.

18 THE COURT: Well, this was a very small store.
19 Didn't she have a maximum of 4,000 sq. ft. of store space
20 and 4,000 ft. of storage.

21 MR. MALTZ: I would have to guess that there is
22 probably over 600 items in the store. There is a huge
23 amount of items. Unfortunately, one of the things that
24 makes it difficult for us, and I discussed it with Mr.
25 Ackerman, we have to do a two day auction because there are

1 rooms just piled floor to ceiling with goods, where it is
2 more like a warehouse.

3 THE COURT: I understand.

4 MR. MALTZ: The place is packed.

5 THE COURT: And you couldn't move this out
6 with one semi trailer? How many cubic feet would this
7 occupy?

8 MR. ACKERMAN: Judge, What I think you are
9 saying is absolutely correct. When I heard Mr. Maltz
10 telling me it would cost about \$20,000 to \$40,000, I said
11 okay, let's not move it, but what you're saying is if we are
12 talking about increasing the price from 250 to 500, then
13 it's a worthwhile -- it's a possibility.

14 THE COURT: Well, I'm trying to understand why
15 it would cost \$20,000 to move 600 items, and I don't know
16 you can't just back it into one truck. Obviously, you would
17 need -- you might need some special packaging material. You
18 would have to have a crew that is far more adept at moving
19 things from one place to another than I.

20 MR. MALTZ: You would probably need 2 to 3 40
21 foot trailers. You would need a crew of how many men to
22 properly wrap and pack. You have chandeliers. You have
23 pianos. You have large objects. You have fragile,
24 breakable items. The way it is set up out there, and like I
25 told Mr. Ackerman, if we can get an auction in this season,

1 by the end of October, we should be fine. The Fall is a
2 very large season out there; and if a sale is properly
3 advertised and marketed, I anticipate no fewer than 100
4 people attending the sale. We're concerned where we are
5 going to park them.

6 THE COURT: You're going to hire valets? Are
7 there any public parking lots or garages?

8 MR. MALTZ: There is a golf driving range next
9 door. We are going to speak to them, and there is an Elks
10 club across the street. So we are going to see if we can
11 utilize one or both of those locations.

12 THE COURT: Can't Mr. Ackerman exploit his
13 membership in the Elks?

14 MR. MALTZ: When I spoke to the principal of the
15 debtor, she said that -- I asked her what she used to do
16 when she ran auctions. She said they had a valet service,
17 and they would take the cars around the block to residential
18 areas which I don't think would really work for our
19 situation and what we have to do.

20 THE COURT: You can hire a bus. But is 100
21 persons a lot turnout for inventory of this value?

22 MR. MALTZ: Yes.

23 THE COURT: And how many buyers do you think
24 you are going to have out of the 100? 20?

25 MR. MALTZ: How many buyers do I think I have?

1 I think I will have 100 buyers. We'll have end users as
2 well as dealers, galleries.

3 THE COURT: Do we know based on the records of
4 the estate, do you know how many persons attended any of the
5 auctions conducted this past summer by Ms. Brunesco?

6 MALE VOICE: I was there.

7 THE COURT: How many people?

8 MALE VOICE: Eight, maybe ten.

9 MR. MALTZ: A sale advertised by the way she did
10 business, that's why we are all in Bankruptcy Court in a
11 properly advertised marketed bankruptcy sale. I don't see
12 why we wouldn't have close to 100 people out there if not
13 more.

14 THE COURT: Do you have any evidence based
15 upon your past experience of what values can be realized in
16 a bankruptcy sponsored auction? Are these going to be
17 distressed prices?

18 MR. MALTZ: It will be reasonable, wholesale
19 prices with similar items like they sell for. We actually
20 found one list of items that she purchased at another
21 auction, that she brought into her store. Her prices are
22 insane for lack of any other word. I mean we have been
23 checking prices of what similar items have sold for compared
24 to the list price on her items there, they are anywhere five
25 to seven times too high. The items will sell for what they

1 are worth. The sale has already been advertised on our
2 website without a date to be determined subject to Court
3 approval.

4 THE COURT: Your representations to the Court
5 because you are not testifying is that you have done these
6 things before of goods of similar quality, of similar scope,
7 and that you believe based upon your network because you
8 have been in this auction business for many, many years, you
9 are probably the principal auctioneer for most of the
10 Trustees in the Eastern District of New York; and you
11 believe based upon your experience, you are going to be able
12 to generate a substantial yield, and you think
13 notwithstanding the limitations in parking, notwithstanding
14 the distances from the location of the store to the major
15 population areas, if I want to sell to this market, I would
16 take certain items that I would think would be attractive,
17 and I would have a sale in Manhasset or Locust Valley or in
18 Great Neck or in the Five Towns, something of that sort.

19 MR. MALTZ: Judge, in all candor, I have a
20 \$15,000 sq. ft. warehouse in Plainview readily available
21 which would be much more convenient for me and my staff to
22 run an auction from there, but I do not feel that it would
23 be cost efficient for this estate to go through the costs of
24 transporting these items there. I don't feel that we would
25 realize that much more, and regardless of how well items are

1 packed, when you are moving that quantity, you will have
2 damage and you will have breakage.

3 THE COURT: Is it possible to have locations
4 simultaneously at two different locations for those items
5 that may command a lot from market and where the
6 transportation and handling costs are lower.

7 MR. MALTZ: Well --

8 THE COURT: Why would I go to buy a piano on
9 the East End. I presume I could go to Steinway dealer or
10 somebody else of that sort. I was quite struck when I went
11 to Fortunoff's --

12 MR. MALTZ: Judge it's not like we have --

13 THE COURT: And there is a Steinway dealer,
14 and I took a look at the piano and I am kicking myself all
15 around the floor, because I sold this marvelous grand that I
16 had when I had to skinny down and come to this remote
17 location from a marvelous suburban area on the coast. So I
18 sold my Steinway that I bought myself as a birthday present
19 ten years before, and I took a real hit. I looked at the
20 prices of these things in the Steinway dealership. Maybe
21 those prices are five to seven times what they should be,
22 but I doubt it. So, there I was in Manhasset and
23 surrounding areas. That was Westbury. But I assume if I
24 went upscale, I'd go to Manhasset.

25 MR. MALTZ: Judge, there is probably more money

1 out there than anywhere else on this Island right now, and
2 the buyers will come. As far as pianos, we only have one of
3 them. What we could do, if certain items do not bring a
4 number that we feel is a reasonable number, we go through
5 the sale. Mr. Ackerman approves the items that he likes.
6 The ones he doesn't, we then move those items, but then our
7 costs associated with moving, would be considerably less
8 because we would be moving only a handful of items.

9 THE COURT: Did you ever set up an auction so
10 that persons who claim these good have an opportunity to
11 make a bid for them, and the proceeds are held pending
12 further determination.

13 MR. MALTZ: All the time. In this case, one of
14 my thoughts was after we identify them by lot numbers, to
15 have these folks come in, let them identify it. We will be
16 able to establish which number is theirs. We will know
17 exactly what the sale proceeds are from their item. They
18 will also have an opportunity to come to the auction and bid
19 on it. If the item doesn't bring as much money as they feel
20 it is worth, it might be more cost efficient for them just
21 to buy it back and wait to get their money back later on if
22 their claim is approved.

23 THE COURT: From their perspective, that means
24 they bought it twice.

25 MR. MALTZ: That's correct.

1 THE COURT: And what do you think the range of
2 sale prices will be?

3 MR. MALTZ: We have items that will bring
4 \$100.00. We have items that will bring thousands of
5 dollars.

6 THE COURT: But of the 600 items using that as
7 a ballpark figure, how many of them will sell for less than
8 \$2,000 per item?

9 MR. MALTZ: I haven't gone through the store
10 that well to answer that question. But overall, you should
11 have in excess of \$100,000 there. Again, like I stated
12 earlier, you have rooms that are just loaded floor to
13 ceiling. I have no idea what's in those rooms until my
14 people get in to start lotting and cataloging and pulling it
15 out.

16 THE COURT: The question is are you going to
17 have enough display space. If it is all packed in rooms
18 that make it very difficult to walk your way through, then
19 how are you going to be able to display the goods?

20 MR. MALTZ: We have two solutions to that
21 problem, which I am going to discuss with Mr. Ackerman after
22 this hearing. One is to run two separate auctions two weeks
23 apart, where we leave that stuff in the room, sell the stuff
24 that is exposed now, and then move that down. The second is
25 to take everything out and may be rent the Elks Club across

1 the street or rent a tent and conduct the auction in there,
2 have an inspection the day before, or the the morning of,
3 take digital pictures of the items, so we can show it prior
4 to sale. Whichever is more cost efficient and Mr. Ackerman
5 decides that we should go forward, is the way we will go it.
6 But we have addressed all of these issues.

7 THE COURT: But your strong preference based
8 upon realizing the maximum amount taking into consideration
9 all of the alternatives, is to do it in place.

10 MR. MALTZ: Without a doubt.

11 THE COURT: Maybe we'll poll some of the
12 brethren here and the sisters where they think it should be
13 sold. All right.

14 Now a number of you -- look it is very difficult
15 for you to go through this. All of you should have gotten
16 notice of the legal arguments. For those of you who
17 represent yourselves and are not lawyers, I'm sure it is
18 very difficult to listen to this and try to penetrate it
19 because it turns on fairly subtle distinctions and you have
20 to put together all kinds of code sections in some coherent
21 way. And unfortunately, there are even disputes among the
22 reporters about how these sections should be construed. I
23 see in some of the commentaries, my former colleague, Steven
24 Harris, who was one of the co-reporters, takes some view and
25 other writers who are very sophisticated teachers of the

1 Uniform Commercial Code, White and Summers, take a view very
2 different from the position taken by Professor Harris, who
3 was one of the principal reports and the one who drafted the
4 notes. So even under this text where it was supposed to be
5 substantially improved and clarified, the law professors
6 can't even agree what these sentences mean, or what these
7 comments mean. I assume these are not just academic
8 disputes. They are real issues about how this law should be
9 applied in the 49 districts in which it may have been
10 enacted. Louisiana always goes its own way.

11 Who is going to address some of the legal
12 arguments made by the combination of Mistrs Ackerman and
13 Bilich? You are?

14 Who claims to be the original artist. Let's get
15 you out of here. Any of you claim to be the original artist
16 who created these art objects and can demonstrate through
17 some verifiable means that you are the artist whose goods
18 will be excepted from the sale.

19 MS. PIAZZOLA: Judge, I represent my father.
20 My name is Tasha Moody-Piazzola, and we put the artwork
21 there as decoration, and they were to sell it.

22 THE COURT: Okay, but your father was the
23 artist?

24 MS. PIAZZOLA: Yes.

25 THE COURT: And he can prove that?

1 MS. PIAZZOLA: Yes. It's patented.

2 THE COURT: Patented?

3 MS. PIAZZOLA: Yes.

4 THE COURT: Artwork is patented?

5 MS. PIAZZOLA: Yes, it is.

6 THE COURT: I thought patents were for designs
7 that are unique.

8 MS. PIAZZOLA: Some sculptures are unique art
9 pieces that are designs and patterns, and they are patented
10 with the US Patent Corporation or whoever it is, because I
11 have all of his --

12 THE COURT: And you have the documentation to
13 establish that?

14 MS. PIAZZOLA: I can get it. I didn't know
15 that I needed it because I am representing my father.

16 THE COURT: Generally, persons represent
17 themselves.

18 MS. PIAZZOLA: Well, I didn't want to put him
19 through this whole scene, because he is a sick elderly man
20 and I was just trying to maintain some business.

21 THE COURT: I appreciate that, but how many
22 items are you talking about, and what is the value you
23 attribute to these items?

24 MS. PIAZZOLA: We have two items there. They
25 were claimed to be \$25,000 for one, and the other one was

1 \$1,000 for Morgansen's Auction House, which always referred
2 as Morgansen's Auction House, but anyway --

3 THE COURT: Look, I am perfectly happy for you
4 to make legal arguments, but the question I raised because
5 Mr. Ackerman was quite direct. If these are works that
6 qualify as works of artists and should be excepted from the
7 scope from the property of the estate, and you can
8 demonstrate that, you will save yourself a lot of cost and
9 bother. You just have to be able to demonstrate to Mr.
10 Ackerman that you qualify under that limited exception. And
11 if your father qualifies under that and you have the
12 documentation and you can point out the objects, we don't
13 have to litigate about it.

14 But if Mr. Ackerman is not satisfied with the
15 documentation, and you can't prove that your father was the
16 artist, we can deal with that perhaps on a separate
17 occasion. Our goal here is to limit the range of
18 controversy. So if you can demonstrate that those are
19 artistic works traceable to the artist, and your father is
20 the artist, you can work something out with Mr. Ackerman.
21 All right.

22 MS. PIAZZOLA: Thank you, Judge.

23 THE COURT: But you use two different names.

24 MS. PIAZZOLA: My married name is Moody, and my
25 father's name which is my name now, I'm divorced, is

1 Piazzola. The work is Piazzola.

2 THE COURT: Spell out your father's name.

3 MS. PIAZZOLA: It's like Mike Piazza. P-I-A-Z-
4 Z-O-L-A.

5 THE COURT: And his first name is?

6 MS. PIAZZOLA: Francesco.

7 THE COURT: F-R-A-N-C-E-S-C-O. Okay. And
8 you are a resident of the Eastern District of New York.

9 MS. PIAZZOLA: Actually, no. We are located in
10 Queens.

11 THE COURT: Queens is in the Eastern District
12 of New York.

13 MS. PIAZZOLA: Oh, okay.

14 THE COURT: The Eastern District of New York
15 for bankruptcy purposes includes Staten Island, Brooklyn,
16 Queens, Nassau and Suffolk.

17 MS. PIAZZOLA: Oh, okay. Thank you.

18 THE COURT: Welcome to the Eastern District.

19 MS. PIAZZOLA: It's so beautiful here.

20 THE COURT: A little remote though. You have
21 to like cows. Yes.

22 MR. ACKERMAN: I have given her my business
23 card. I have asked her to fax the patents to me, and we are
24 going to immediately get that to Mr. Maltz to see if the
25 items are there.

1 THE COURT: Okay. Have you seen them there,
2 Ms. Piazzola?

3 MS. PIAZZOLA: Yes, I have.

4 THE COURT: All right. Any further persons in
5 this category? All right.

6 MR. FAVER: I'm sorry your Honor. My name is
7 Paul Faver.

8 THE COURT: Paul what?

9 MR. FAVER: Faver. F-A-V-E-R, if I may approach
10 the lectern, your Honor.

11 THE COURT: Yes. You can sit and talk from
12 there. Whatever is more convenient for you.

13 MR. FAVER: Well the other side stood up here.

14 THE COURT: We don't stand on ceremony on such
15 minor matters. It's just so you can be heard.

16 MR. FAVER: Judge, again, my name is Paul Faver.
17 I find a lot of discussion today rather intellectually
18 intriguing.

19 THE COURT: But it doesn't put the dollars in
20 your pocket. I understand that.

21 MR. FAVER: I'm sorry, your Honor.

22 THE COURT: It doesn't get dollars in your
23 pocket.

24 MR. FAVER: But the reality is that I actually
25 want to engage in that intellectual discussion. I agree in

1 large part with your former colleague, Steven Harris. I
2 assume the technical interpretations of the Code.

3 THE COURT: You are here on your own.

4 MR. FAVER: Yes, sir. I no longer practice
5 law.

6 THE COURT: Yes, sir.

7 MR. FAVER: I no longer practice law. I'm here
8 to represent myself.

9 THE COURT: You were once admitted?

10 MR. FAVER: Yes, your Honor.

11 THE COURT: What are the items that you are
12 claiming to be yours.

13 MR. FAVER: Mine Judge is the Chanukah Menorah.

14 THE COURT: What's that?

15 MR. FAVER: The Chanukah Menorah. It's a bronze
16 sculpture.

17 THE COURT: And the Menorah is --

18 MR. FAVER: For the record, I intend once -- if
19 I secure for the return of it to contribute it and donate it
20 to the 92nd Street Y; so it means more to me than the
21 proceeds itself.

22 THE COURT: That's not going to influence me.
23 You can engage in whatever charitable activities.

24 MR. FAVER: But there was a discussion earlier
25 as to what proceeds and alike.

1 THE COURT: There are some traditions that say
2 that charitable gifts are the ones that are not disclosed.

3 MR. FAVER: There are tenants to that effect.

4 THE COURT: So you have a Menorah, and what's
5 the market value attributed to the Menorah?

6 MR. FAVER: \$4,500. It's a bronze sculpture.
7 And although I would obviously love to address a lot of the
8 practical issues about the sale and alike and the other
9 things, I think the legal issues you raised are rather
10 interesting, and some of the answers that were debated
11 rather extensively are simpler than what they may appear.
12 Although this whole area seems complicated, I think if we
13 take a step back from it, Judge, and walk through it step by
14 step, code by code, I think we will figure out the answers
15 to the questions here despite how convoluted and complex
16 they may otherwise seem.

17 Your question about consignment goods, Judge, was
18 clearly answered in the code itself under 102 20(c). There
19 was a lot of discussion about consumer good and when it is a
20 consumer good when a purchaser takes it from Morgansen's and
21 brings it home or if it is an Armoire that has been in the
22 family for a long time, and really all of that is rather
23 interesting, the code specifically says exactly when it is
24 we look to determine whether an item is actually a consumer
25 good for purposes of whether it is consignment under Article

1 9.

2 THE COURT: Go slow Mr. Faver. I don't talk
3 or think as fast as you do.

4 MR. FAVER: When I clerked for a Judge in the
5 South --

6 THE COURT: What's that?

7 MR. FAVER: When I clerked for a Judge who was
8 in the South, I thought I talked slowly, Judge.

9 THE COURT: 1-02.

10 MR. FAVER: I heard reference to Judge Paske
11 brought back fond memories actually.

12 THE COURT: A lot of people didn't have fond
13 memories.

14 MR. FAVER: I know that. I was never on that
15 side of the bench.

16 THE COURT: You said 1-02?

17 MR. FAVER: 102 20 (c). Here it says --

18 THE COURT: Counsel, I am trying to find the
19 section. You said it's under 1-02?

20 MR. FAVER: 102. It's the definitional section.
21 9-102.

22 THE COURT: Yes.

23 MR. FAVER: 20 (c). This is the definition that
24 we were discussing about what constitutes a consignment for
25 purposes of Article 9.

1 THE COURT: Okay.

2 MR. FAVER: If you recall, we had extensive
3 discussion earlier about whether it is a consumer good and
4 therefore exempt, and if the consumer purchased it from
5 Morgansen's and took it home and used it for personal use,
6 is that a consumer's good. But it is rather clear right
7 here where it says the goods are not consumer goods
8 immediately before delivery. So the issue is whether the
9 consignors, the people here, whether it was a consumer good
10 to us at that time, just like your armoire from your
11 grandmother was a consumer good for you at that time.
12 That's the defining moment in time.

13 THE COURT: The armoire is from Arizona,
14 rather inexpensive because it was large. It was the plates
15 from the great-grandmother. But that's not relevant to the
16 record. All right. So you're telling me I should look at
17 9-102 20 (c). Okay. And you are telling me the point of
18 reference is not the point of reference from Morgansen's
19 perspective, but the status of these goods in the hands of
20 the person who delivered them.

21 MR. FAVER: Which would be the consignors in
22 this case. For purposes of determining Judge that this is
23 albeit a consignment in a general way, is not a consignment
24 as the counsel for the Bankruptcy Trustee conceded for
25 purposes of Article 9 which is the purpose behind this

1 change in 102 20 (c) or 20 generally.

2 THE COURT: How do you demonstrate that your
3 Menorah is a consumer good?

4 MR. FAVER: Well, then we go back down to the
5 code Judge, consumer goods means goods that are user bought
6 for use primarily for personal, family, or household
7 purposes; and clearly when it was in my possession before
8 delivery, it was clearly used for those purposes.

9 THE COURT: I would have to check out if there
10 was any melted wax.

11 MR. FAVER: I cleaned it, your Honor.

12 THE COURT: You cleaned it up. So you are
13 going to show me pictures of the candlelight?

14 MR. FAVER: There is a picture as Exhibit A
15 without the candles but I suppose --

16 THE COURT: Okay. How old is this?

17 MR. FAVER: It was purchased in 1999.

18 THE COURT: What's the date of manufacture?

19 MR. FAVER: I'm sorry, your Honor.

20 THE COURT: Do you know the date of
21 manufacture?

22 MR. FAVER: Not long before it. It was one of
23 the earliest in the edition.

24 THE COURT: It's a contemporary item. Okay.
25 I have the picture.

1 MR. FAVER: I think for purposes of legal
2 analysis, we can start where you were earlier in terms of
3 whether it was a consumer good and if it is a consumer good,
4 then it is therefore no longer consigned for purposes of
5 Article 9. Although you can look to the other question
6 rather extensively, and that is of an auctioneer.

7 THE COURT: Wait. Before you go there, Mr.
8 Bilich said if it falls outside of Article 9, we agree there
9 were two routes out.

10 MR. FAVER: That's correct.

11 THE COURT: It's either out of the code or
12 under 326. So let's assume you are right and it is not
13 consigned for purposes of Article 9. We don't have all of
14 the perfection rules. The question is now how do you escape
15 the reach of 326.

16 MR. FAVER: Your Honor, I again just go to the
17 code itself, although I would like to point out the earlier
18 amended version, but your former colleague, Steven Harris
19 had it right. Morgansen's is not a buyer. If we go to the
20 statute 326 which is a sole and exclusive basis for the
21 Bankruptcy Trustee's position, it talks solely and
22 exclusively in terms of a buyer. And again, if we simply
23 just look at the code and look at the section that defines
24 buyer, which is 2-103 1(a) --

25 THE COURT: Wait a minute. Slowly. 2- --

1 MR. FAVER: I'm sorry, Judge. 2-103 1(a). I
2 think I have been in the northeast too long perhaps, talking
3 a little too rapidly.

4 THE COURT: You should recognize that I'm from
5 the northeast but more northeast where we talk slower.
6 Okay. If I go to 2-103 1(a), that is going to tell me?

7 MR. FAVER: Let's make sure I understand it and
8 perhaps that we all understand correctly that UCC 2-326
9 talks explicitly and exclusively about a buyer and the
10 buyer's creditors. I think we can all agree on the plain
11 meaning of the language used in the statute. And once we do
12 that, then we go to the definitional section of the statute
13 that defines buyer. And that section, your Honor --

14 THE COURT: Hold on, counsel. It's like Alice
15 in Wonderland, chasing the rabbit. 2-103 1 (a).

16 MR. FAVER: It's the first definition.

17 THE COURT: All right. It means a person who
18 buys or contracts to buy goods.

19 MR. FAVER: Yes, your Honor, and in this case
20 Morgansen's neither bought nor contracted to buy my Chanukah
21 Menorah. The consignment agreement makes it absolutely
22 clear that there was no purchase by Morgansen's of my
23 Menorah; and therefore, they are not a buyer for purposes of
24 Section 326. Therefore, 326 is inapplicable to this set of
25 circumstances. Now, although it is simple I think and

1 straight forward by reading the statute itself and going to
2 the definitional section as your Honor has on so many other
3 appropriate occasions, we can also look at the amended
4 version of 2001. In that, if you look at my papers, I
5 stated in its entirety in footnote three in the title of
6 that statute, your Honor, I think really speaks volumes.
7 This is the former statute.

8 THE COURT: Why am I looking at the former
9 statute?

10 MR. FAVER: Because that, your Honor, before it
11 was amended was titled Sale on Approval and Sale or Return
12 and I quote "consignment sales" and rights of creditors.
13 You see when the Legislature amended the statute your Honor,
14 they specifically and intentionally omitted consignment
15 sales from this statute. Ironically, just as I pounded home
16 a minute ago that the language was buyer, buyer, buyer, when
17 you look at the former sub-section 3 which was the section
18 that was equally omitted that dealt with consignments, it
19 discusses slowly and exclusively in terms of the person not
20 the buyer Judge.

21 THE COURT: I don't know where this goes. I
22 think this still evades the question, because if someone is
23 reselling goods on a sale or return basis, there is no
24 exclusion under the definition of buyer or person in that
25 category so it may well be that a person excepts delivery of

1 goods on a sale or return can be determined for bankruptcy
2 purposes as well as state law purposes to be a buyer. I
3 don't think this definition takes you home, but you have to
4 consider it.

5 MR. FAVER: But I noticed in your use --

6 THE COURT: But a consignment, whatever you
7 want to call it, sale or return, there was a reason for
8 dropping sub-section 3 because it confused the hell out of
9 everybody. And we had to go back to the drawing board to
10 try to clarify it and apparently there was some question
11 about whether it was adequately clarified so maybe we give
12 praise to my former colleague, Steve Harris, and then fault
13 him for not having drafted this as well as he can. And his
14 defense would be I had to listen to all kinds of lawyers who
15 represented different interests. So the language got
16 watered down or got confused, because it is a negotiated
17 process. And the draft that I submitted which was pristine
18 and clear was destroyed by all of these years and years and
19 years of going back and forth with the commentators. But
20 apart from that imaginary conversation, because I have had
21 that conversation with him, but not when I was on the Court.

22

23 MR. FAVER: Mr. Harris' thoughts on that are
24 specifically quoted in White and Summer where Mr. Harris has
25 taken the position that I have asserted in advance here

1 Judge that it is not a buyer.

2 THE COURT: And Mr. Harris, as you pointed,
3 has severely discounted buyer in White and Summer. It's a
4 nice argument. We don't buy it.

5 MR. FAVER: And even if we would go to the White
6 and Summer direction, we still prevail, and here's why,
7 Judge because White and Summer --

8 THE COURT: Okay, but you know White and
9 Summer aren't courts. They are just treatises, and I have
10 to make a decision based upon language preferably as
11 construed by the Courts and I give some weight but not very
12 much to academic commentary.

13 MR. FAVER: Well, let's give it some weight
14 because White and Summer said exactly what you said at the
15 beginning of this hearing, your Honor, and that is, there is
16 an agreement. There is an agreement between the parties and
17 despite counsel from the Bankruptcy's initial view that
18 there was no such agreement to be otherwise considered,
19 White and Summer said there is. And what we do, is we look
20 at that agreement to determine whether or not potentially
21 they are a buyer for purposes of 326. So in other words, if
22 the written agreement specifically talks in terms of a
23 consignment and that the consignee is acting as the agent of
24 the consignor, which it does your Honor. That is Exhibit B
25 in my papers, then White and Summer also agree with me that

1 326 is inapplicable.

2 THE COURT: But, you are not capturing the
3 point that was made by the Trustee. It doesn't matter what
4 you write. Because these agreements are not going to be
5 publically available. So you may enter into an agreement
6 and call a horse or a cop, that doesn't bind the universe
7 because you've entered into what the philosophers call a
8 private language and the meaning of words is only in their
9 use and the public.

10 We can't be bound by private agreements in which
11 you define things in unique ways, and what Mr. Ackerman's
12 point was is that from the standpoint of a hypothetical lien
13 creditor of the Trustee as avoidance powers. He does take
14 subject to your private agreements in which you define
15 things in a way that's maybe advantageous to you or even
16 advantageous to Morgansen's. He is looking for some
17 objective rule and I think that part of the difficulty is
18 that we sometimes seem to be under objective rules, we seem
19 sometimes to be under agreements, and I have to sort that
20 thing through.

21 I don't reject your agreement out of hand, but it
22 is not persuasive. I have to look at it and then I have to
23 determine what the substance of that agreement is, not its
24 form.

25 MR. FAVER: In substance of that agreement, your

1 Honor, specifically says that they were acting as an agent
2 and not a buyer, which then determines as we have discussed
3 already whether 326 applies. And really what happens
4 privately or publically may be of less consequence than what
5 the Legislature did when the made this amendment in 2001.

6 You see what they did, Judge, and when you think
7 through it, just as White and Summers explains in their
8 treatise, is that they removed consignments like what we're
9 discussing here, where people put their personal belongings
10 in the hands of an auctioneer or consignment store just as
11 we did. They exclude it from Article 9 and say, hey, guys,
12 you don't have to deal with those sophisticated UCC
13 financing statement rules; and by the way, you are not going
14 to have to worry either about being subordinated to the
15 rights of the consignee because they are not a buyer.
16 So the Legislature was protecting the person.

17 You talked about the estate sale earlier. The
18 ladies of Beacon Hill, I believe.

19 THE COURT: Yes, the ladies on the Hill.

20 MR. FAVER: And it was the ladies of Beacon Hill
21 and people which perhaps is the most vivid picture we have;
22 maybe elderly people putting this goods on consignment with
23 the neighborhood consignment store because they need money
24 to cover their rent and alike. Although that may be the
25 vivid picture, the intentions equally apply here.

1 THE COURT: No, no, no. Well I drive through
2 certain communities, and I see a consignment store. They
3 are often called thrift stores, and they sell used clothing,
4 what the UCC does is taking that out of the box. That's a
5 very specialized industry, not of great commercial
6 significance, so people deliver those goods on some
7 consignment. The store is marked as consignment. There is
8 no original inventory there. Everyone knows what you are
9 doing, when you walk in there. Then you have entrusted
10 situation in which your watch for repair, and the jeweler
11 puts it in his display case, and he sells it. So we have a
12 classic entrusted situation that has been well defined
13 institutionally and through practices.

14 And then the code draws a distinction, a rather
15 unclear distinction, between consumer consignments and
16 commercial consignments. And those terms are reflected in
17 the White and Summers commentary.

18 So the question is for purposes of this estate,
19 one way of asking the question may be are these consumer
20 consignments or commercial consignments. And if they are
21 commercial consignments, they are bound by these provisions.
22 If they are consumer consignments, we have to look much more
23 closely. So I need to know from the Trustee's standpoint is
24 it fair to draw this distinction, Mr. Ackerman? Can I ask
25 questions about whether these are commercial consignments or

1 consumer consignments?

2 MR. ACKERMAN: Judge, I don't believe so.

3 THE COURT: You don't believe I should draw
4 that distinction?

5 MR. ACKERMAN: I think that basically White and
6 Summers is just one thing but in fact they would say what
7 the creditors are looking at. 2-326 --

8 THE COURT: Well you say look at the
9 creditors. Mr. Faver is saying look at the person's use of
10 those goods before they were delivered to Morgansen's. So
11 we have two perhaps incompatible views, and the question is
12 which perspective controls.

13 MR. ACKERMAN: There are two ramifications --

14 THE COURT: Mr. Faver said irrespective of the
15 person in this case he uses the Menorah in his home and he
16 wants to sell it for whatever reason. He got a more
17 expensive Menorah, or he stopped lighting candles or
18 converted or whatever. We don't need to get into that. So
19 he puts this up for sale for resale through Morgansen's.
20 Maybe he had a prior relationship with that company. Maybe
21 they disposed of other items for his benefit. But he says
22 look at this situation when it was in my hand before I
23 turned it over, and that ought to be controlled.

24 You say no. We are in a bankruptcy court. We
25 are only dealing with debtor/creditor relationships, and

1 even though outside of bankruptcy there might be a different
2 kind of arrangement or understanding, I should look
3 exclusively from the standpoint of Morgansen's creditors.

4 MR. ACKERMAN: I would say there are two --

5 THE COURT: I can't possibly reconcile these
6 two positions.

7 MR. ACKERMAN: Well, I think we can. The
8 ramifications -- there are two ramifications to this
9 argument. The first one is basically this. UCC 2-326 does
10 not exist. When it says --

11 THE COURT: UCC 2-326 does not exist?

12 MR. ACKERMAN: That is what he is saying that
13 this section of the UCC -- not that it doesn't apply, it
14 doesn't exist. He is saying where it says if delivered
15 goods are delivered primarily for resale, that doesn't
16 matter. That was a mistake that they put that in the UCC.

17 THE COURT: He says you have to read the text
18 as an integrated whole, and I have to make sense of
19 provisions and see them at their face to go into different
20 directions. I can't say I am going to ignore the
21 definitions of the definitional section. I assume those
22 definitions are applied across the board under all of the
23 articles.

24 MR. ACKERMAN: I think there is a second
25 ramification though, Judge.

1 THE COURT: Yes.

2 MR. ACKERMAN: And that is in every single
3 bankruptcy case that involves a business from now on, we can
4 have people coming in and saying they are holding my
5 consigned goods. I can't prove it. Maybe I even have a
6 consignment agreement. It's my property. Creditors would
7 take security interests. They would maybe take a security
8 interest in all inventory and collateral. It doesn't
9 matter. Nobody in the public is protected. It doesn't
10 matter if --

11 THE COURT: Wait a minute. It's between a
12 landlord or the gas company, why should their rights be
13 greater than the person's who delivered the goods.

14 MR. ACKERMAN: They're not. They are the same.

15 THE COURT: What do you mean they are the
16 same.

17 MR. ACKERMAN: They are both unsecured
18 creditors.

19 THE COURT: I see.

20 MR. ACKERMAN: Mr. Bilich, you wanted to add
21 something.

22 MR. BILICH: I just want to make a couple of
23 points --

24 THE COURT: Make it quick.

25 MR. BILICH: -- a couple of points which are

1 really repeated from before.

2 THE COURT: Don't repeat it. I remembered it
3 the first time.

4 MR. BILICH: The definition in Article 9 that we
5 are looking at is limited to Article 9. I don't believe it
6 has any application to Article 2.

7 THE COURT: You're telling me that there is a
8 more specific rule that governs transactions under 9; and
9 when you have a more specific definition, that controls over
10 the general definition.

11 MR. BILICH: Not only that, but if you look at
12 the definition -- if you look at 9-102, it's lead in says in
13 this Article, the following terms mean the following in this
14 Article. So I don't believe that the Article 9 definition
15 has any force in interpreting Article 2. Article 2 talks
16 about goods.

17 THE COURT: I understand what they are talking
18 about. I am not sure that argument is persuasive.

19 MR. BILICH: Neil's point, which I would like
20 to try and articulate a little better.

21 THE COURT: Well we're not going to be
22 resorting to first names.

23 MR. FAVER: I'm getting double teamed Judge.

24 THE COURT: Mr. Faver, you can be triple
25 teamed. I'm sure you would hold your ground.

1 MR. BILICH: He can handle it. I think if 2-326
2 does not apply to Morgansen's, does not apply to this fact
3 situation, we can't figure out what it would apply to. So I
4 think the argument proves too much.

5 THE COURT: Well we could have a statutory
6 provision that is meaningless. It could be. Back to the
7 drafting table. Okay. I got your point.

8 Mr. Faver anything else?

9 MR. BILICH: One further point. I do believe
10 that Morgansen's is a buyer and the reasoning for that is if
11 the customer that comes into Morgansen's and buys this
12 Menorah, he gets an invoice or a bill of sale from
13 Morgansen's. He deals with Morgansen's. He's in privity
14 with Morgansen's. He doesn't know any other seller. If he
15 has any remedy against any defect, it's against Morgansen's.
16 From that I conclude that he has bought from Morgansen's
17 which means that the reality of this transaction is that
18 Morgansen's has bought from the consignor --

19 THE COURT: I'm going to tell you that there
20 is a certain mysticism that goes on here, and it is a
21 tradition that doesn't follow from Menorahs. This good can
22 be in one category from the time it is delivered to the time
23 it is about to be resold. At the very time that it is to be
24 resold, its legal character can shift. So until it is sold,
25 it may occupy one status, and Mr. Faver may be right.

1 After it is resold, at the time it is being
2 resold, it may be the case that from your perspective as
3 soon as she negotiates a sale that would be enforceable, she
4 then buys the good from Mr. Faver and then becomes a trustee
5 with respect to the proceeds. So it could be a case that
6 while it is on the store shelves and it hasn't been sold,
7 she hasn't become a buyer of it yet. She only buys at the
8 point of sale -- resale.

9 MR. BILICH: That definition of buyer -- the
10 definition of buyer in the code is one that buys or
11 contracts to buy and I view this as Morgansen's contracted
12 to buy the Menorah subject to a condition that it is able to
13 sell it.

14 THE COURT: And why isn't that a contract
15 subject to a condition subsequent that I -- hold on -- that
16 I become a buyer only when I have a resale customer. And at
17 that point in time I now become the buyer.

18 MR. BILICH: You're right. But there are two
19 elements to the definition of buyer. One is an actual
20 buyer, and one who has a contract to buy; and what I am
21 asserting is that Morgansen's when it signs this consignment
22 agreement has a contract to buy subject to a condition that
23 it is able to sell it.

24 THE COURT: Well, that's the question when
25 does she become a buyer: at the date of delivery or the date

1 of resale, and I am not sure that it is answered by the
2 code.

3 MR. FAVER: That's a trust question, your Honor.
4 It goes to equitable versus legal title.

5 THE COURT: UCC is supposed to set up rules of
6 law.

7 MR. FAVER: I want to go back to the UCC.

8 THE COURT: Make it quick, because there are
9 other people who want to address the Court.

10 MR. FAVER: Your last point about how you
11 reconciled the generally known versus the consumer good is
12 rather easy, Judge, because under 9-102 20 all of those
13 conditions must be met. There is a conjunction at the end.
14 And. So it has to be not a consumer good for example,
15 immediately before delivery. It has to be generally known
16 by the creditors to be in the business of selling goods of
17 others.

18 And Judge, I want to make this distinction,
19 because the generally known language we've confused today
20 with the auctioneer language. It is not whether someone is
21 generally known as an auctioneer, Judge, the issue is
22 whether the entity is an auctioneer; not whether it is
23 generally known as it would be in the very next provision as
24 to whether it is generally known to be in the business of
25 selling goods to others.

1 And with all of that said, Judge, it comes rather
2 clear that Morgansen's was an auctioneer using the numbers
3 that were spouted out to us earlier today.

4 Do you realize that 600-700 items, there are 300
5 consigned orders, but that only assumes that each consignor
6 has one good. In other words, the majority of these goods
7 were those put on consignment for auction, not the ones that
8 we're told were bought and sold by the entity by
9 Morgansen's. So it is important just to make sure we're
10 paying attention as well to the numbers that are being
11 rattled off here and the consequence and the legal issues.

12 THE COURT: Well, I don't know if your
13 agreement can be characterized as an auction agreement. If
14 a majority of these people put these up for auction, then
15 you are dealing with an auctioneer. And the question is
16 whether or not you gave that discretion in terms of
17 disposition to Morgansen's and they could sell it by auction
18 with or without reserve or they could sell it to a private
19 customer and whether you basically licensed Morgansen's to
20 do whatever they please, and then you get into a question is
21 it a bailment, which takes us other places.

22 MR. FAVER: The 9-102 real simply just says is
23 not an auctioneer and here we are dealing with an
24 auctioneer. It's a factual question, yes, but it is a
25 rather easily resolved factual question. When you look at

1 the sign in the front, when you look at the business card,
2 when you look at the consignment agreement, when you hear
3 about the auctions that are being conducted when you go to
4 their website about auctions that have been conducted, not
5 just in their title but in the way they operated their
6 business. They are an auctioneer, and under the statute
7 under 102 (c) 20, once they are an Auctioneer, they are no
8 longer under Article 9.

9 Here's the analysis in a nutshell. You're ready.
10 We've got 102 20, if it is not Article 9, then there is no
11 UCC required; and then just as you have said on a number of
12 occasions earlier when talking with the counsel for the
13 bankruptcy, Judge, the question comes down to whether 2-326
14 applies or we go to the common law. So once Article 9 is
15 inapplicable, as I think it clearly is because either it is
16 an auctioneer generally known as or the consumer goods that
17 we discussed ad nauseam, then we go to whether it is 326 in
18 which case you can take either Professor Harris' view, which
19 I do, which you look at the term buyer, that's the term used
20 in the statute, passed by the Legislature. The Legislature
21 in a definitional section also gave us a definition of
22 buyer, and it is inapplicable, or you can look at it like
23 White and Summer does and says let's look at the agreement
24 and see whether or not the entity was in fact a buyer or in
25 fact was a bailee in terms of consignment.

1 And in here this company, Morgansen's was nothing
2 ever more than a bailee in terms of our consigned goods.
3 And as a consequence, 2-326 is inapplicable. We go to the
4 common law. The common law says very clearly that under
5 these circumstances our interests prevail, that they were
6 being held in trust as our agent.

7 THE COURT: You don't need to keep repeating
8 it. I've got the summary.

9 MR. FAVER: Thank you, your Honor.

10 THE COURT: And what is it that you are doing
11 for a living these days?

12 MR. FAVER: I develop real estate.

13 THE COURT: I figured. You are building low
14 cost, affordable housing.

15 MR. FAVER: Actually, it's part of what I do.

16 THE COURT: How much of a part that you do?
17 10%, 20%, 30%. What is it?

18 MR. FAVER: There's a definitional term under
19 the code. But you can see, I miss some parts of the
20 practice of law and that was the intellectual discussion we
21 had here Judge.

22 THE COURT: I understand that, and then I want
23 to know what Yeshiva you attended. Thank you.

24 MR. FAVER: Thank you, your Honor.

25 THE COURT: Who else wants to address the

1 Court who is appearing not pro se but a lawyer in active
2 practice.

3 MR. COSTELL: Alan Costell, your Honor, for
4 Carey Turnbull, and I have submitted objections and --

5 THE COURT: Did you submit a brief on it?

6 MR. COSTELL: No, I did not. My objections
7 contain some law, and I will address --

8 THE COURT: Look since you had a limited time
9 to respond, I just want to make sure that you are prepared
10 to stand on your papers or your asking for a very limited
11 period of time to supplement your papers to address these
12 legal issues.

13 MR. COSTELL: At this time, I don't think we
14 would like to supplement. Basically, the legal position
15 that is set forth in my papers --

16 THE COURT: Okay, so I should rely on your
17 papers, right?

18 MR. COSTELL: Yes, you can. I just want to
19 highlight them in that in the worse case scenario, my client
20 has a PMSI, which is unperfected, and I don't believe that
21 the law states, although the Trustee has unequivocally taken
22 the position that the Trustee is a secured creditor that has
23 any superior rights to the --

24 THE COURT: He says he is a hypothetical lien
25 creditor, by operation of law, and if the PMSI is

1 unperfected --

2 MR. COSTELL: That's against all other
3 creditors.

4 THE COURT: No. Yes, that's against all other
5 creditors, and he's going to come in here and say if you are
6 unperfected, you're subordinate to my interest.

7 MR. COSTELL: And I don't think that is clear
8 because at best, he is just another creditor.

9 THE COURT: Not just another creditor. For
10 certain purposes; for hypothetical lien creditor. It's as
11 if he had a judgment lien and under state law, if he has a
12 judgment lien and you are unperfected, you lose to him. You
13 take a junior priority.

14 MR. COSTELL: In effect, he is asking for a
15 declaratory judgment as to ownership of the property. I
16 think he needs to begin an adversary proceeding. My papers
17 set forth our position. The other argument or matters that
18 I would like to raise are that Mr. Ackerman is in possession
19 of the agreement between Morgansen's and my client, which
20 clearly sets forth a reserve and a non-reserve on every
21 item. Clearly as to my client, Morgansen's was an
22 auctioneer

23 THE COURT: Okay. What's the value of the
24 items of your client?

25 MR. COSTELL: We are not sure -- we have not

1 been able to get in to see what items are present and not
2 present, but the approximate value is between \$20,000 and
3 \$25,000.

4 THE COURT: How many items does not consist
5 of?

6 MR. COSTELL: That consists of -- well not
7 knowing which were precisely sold, there are three
8 significant items of more than \$5,000 each.

9 THE COURT: What are they?

10 MR. COSTELL: There are a couple of items that
11 are worth approximately \$5,000 each.

12 THE COURT: What are they?

13 MR. COSTELL: One is a table and chair set, and
14 the other is an antique stove.

15 THE COURT: Now, I take it Mr. Ackerman
16 because of the condition of the premises, Mr. Maltz was not
17 able to do a detailed inventory of every item.

18 MR. ACKERMAN: Not of every single item, Judge,
19 but he did review and did allow an inspection.

20 THE COURT: Is there anyway of identifying Mr.
21 Costell's client's items: table and chair and the stove?

22 MR. ACKERMAN: Judge, without him going there to
23 identify them, there is a table and chair -- there are many
24 tables and chairs there. There are one or two old stoves
25 there. If they are his or not, we did have an inspection, I

1 believe last Friday morning for whoever could make it to
2 identify their items. I have no problem letting him in to
3 verify if his items are there or not.

4 THE COURT: Mr. Ackerman, we have been at this
5 for a bit. You know I can go on until 9:00 this evening but
6 that's not going to happen. So, for the benefit of my
7 staff, we are going to have to take a break. Persons may
8 leave the court house or go down to the cafeteria. I don't
9 know if the persons here want to collaborate. It is not Mr.
10 Ackerman's intention to engage in divide and conquer
11 strategies, but I do think to the extent that some of you
12 have common interests, you might want to talk among
13 yourselves if you haven't already and try to determine if
14 some of you can join in kind of a united front.

15 MR. ACKERMAN: Judge --

16 THE COURT: I'm not requiring you to form a
17 committee. I am not imposing it as a requirement to
18 participate here, but I do think it is in your collective
19 interests to spread your risks involved.

20 MR. FAVER: Judge, I did in my papers request a
21 designation of a committee given the circumstances, there
22 are approximately 300 consignors. Given the commonality of
23 the legal issues, perhaps --

24 THE COURT: The question is can you have --
25 let's assume that we are going to treat these as creditors,

1 because that's the way you are viewing them Mr. Ackerman,
2 and the question is does the Court have an authority in a
3 Chapter 7 to appoint a committee.

4 MR. ACKERMAN: I believe you do. I don't know
5 what a committee would do, but I believe it is under Section
6 705. Yes, 705. Actually, it says may elect a committee.

7 THE COURT: I'm going to 705.

8 MR. ACKERMAN: You're going to hate me. It is
9 also 105 (a).

10 THE COURT: Oh, look at this. Section 707,
11 look what the top case on the page is in the 2003 pamphlet
12 edition. I'll let you look at it.

13 705 Creditor's Committee. Let the meeting under
14 Section 341, Creditors that may vote for Trustee under
15 Section 702 of this title, may elect a committee of not
16 fewer than three and not more than eleven creditors, each of
17 whom holds an allowable unsecured claim of a kind until time
18 of distribution under Section 726 (a) 2 of this title. A
19 committee elected under this sub-section (a) of this section
20 may consult with the Trustee of the United States Trustee
21 connected with the administration of the estate, make
22 recommendations to the Trustee or the United States Trustee
23 respecting the performance of the Trustee's duties and
24 submit to the Court of the United States Trustee any
25 question affecting the administration of the estate.

1 I assume this may be denominated an official
2 committee?

3 MR. ACKERMAN: I believe so Judge.

4 THE COURT: Okay. When was the 341 meeting
5 held?

6 MR. ACKERMAN: It was held on September 29;
7 September 27th or September 29; however it is rescheduled
8 for October 9 at 2:30. Mrs. Brunesco is trying to get out
9 of coming, but I am --

10 THE COURT: Who?

11 MR. ACKERMAN: Mrs. Brunesco who is the
12 purported principal of the company is trying to get out of
13 coming, but I am insisting that she come. I just want
14 people to know about that.

15 MR. FAVER: Your Honor, given what you just read
16 there, there may be a more practical resolution to this
17 whole problem.

18 THE COURT: Just hold on. Let me find the
19 numbers. Cool your jets. I think this refers to an
20 official committee, and I think that is the most convenient
21 time to do it at a meeting of the creditors, and it doesn't
22 say at the initial date of creditors which we have other
23 purposes under the Bankruptcy Code, and we not talking here
24 about creditors voting for a Trustee.

25 Part of the problem is that most of you are

1 taking the position that you are not a creditor, you are an
2 owner except to the extent that you have claims of
3 conversion. But nothing precludes you from forming
4 informally your own committee and appearing collectively
5 through representatives, so I think it is not radical
6 extension and it is really a question of economizing, and I
7 am not triggering class certification rules. If some of you
8 want to participate together and you want to retain counsel,
9 that is something -- that is a private agreement that you
10 can make. You don't have to do it today.

11 You ought to have a sign up list, and you
12 exchange addresses and telephone numbers and things of that
13 sort, but I think it might be helpful for some of you to do
14 that during a lunch hour so you can decide whether it makes
15 sense for you to go it alone on a pro se basis, whether you
16 want to retain counsel after this hearing with respect to
17 your particular claim, but there is a timing issue here.

18 Because the Trustee wants to get a move on to
19 capture the season, and some of you should address whether
20 or not there is a season through the end of October, whether
21 you think it should be sold in place or at another place
22 without conceding the validity of your objections. I just
23 want you to give us some input.

24 MR. GOLDBERG: May we be heard on the issue of
25 fraud?

1 THE COURT: No. Any -- that's not the issue
2 before the Court. If you think you have been defrauded by
3 Ms. Brunesco or by Morgansen's, that's information you
4 should share with the Trustee. You have direct cause of
5 action in state court against Ms. Brunesco. If she used the
6 corporation and she is the officer or director and
7 shareholder and committed fraud, you may have a claim
8 against her directly. It has nothing to do with the
9 bankruptcy estate. I am not making that determination, but
10 it is not the US Trustee's position to pursue individual
11 claims of fraud on behalf of persons who appraised the
12 estate. That is not his job. If you give him information
13 that he believes should be reported to the criminal
14 authorities, that's another matter, but this is not a court
15 for individual creditors against a corporation can assert
16 fraud claim. You can assert a claim for damages arising
17 from fraud, and if it doesn't draw an objection from the
18 Trustee or any other creditors, you basically have
19 quantified your claim and you participate on a pro rata
20 distribution with other creditors in your class.

21 MR. GOLDBERG: Your honor, the mere fact that
22 two or three -- Marvin Goldberg appearing on my own. The
23 mere fact that 200 or 300 people as the Trustee mentioned
24 were not notified were named in the petition in and of
25 itself should be a red light that something underhanded was

1 going on in this situation.

2 THE COURT: Mr. Goldberg I don't have to
3 speculate about that. I tried to address it. Mr. Ackerman
4 pursued it much more vigilantly than Mr. Weiss who was
5 representing Ms. Brunesco and the corporation. But I don't
6 think a failure to list all of the persons is tantamount to
7 fraud. That's an item that you can make against her.

8 MR. GOLDBERG: Your Honor, Ms. Brunesco
9 appeared at our house on two occasions. First occasion she
10 looked to see what property we had available, and on the
11 second occasion, she had brought a truck and she removed a
12 certain number of items and brought them to her facility.
13 At no time was it our intention that title to these goods
14 were to be turned over to her. In fact, I don't believe it
15 was her intention to accept title to these goods. By virtue
16 of her own consignment agreement, the first --

17 THE COURT: Mr. Goldberg, look.

18 MR. GOLDBERG: May I just state this. Paragraph
19 1 of her consignment agreement states you, consignor, hereby
20 consigns to Morgansen's the property annexed and described
21 and further referred to in this agreement as the property or
22 lots which Morgansen's as the exclusive agent for consignor.
23 She talks about herself as being an exclusive agent. She
24 doesn't claim to have ownership or title to this property,
25 and I believe if you had all of these consignors, so called,

1 testify under oath, not one of them will agree that they had
2 an intention of turning over the title of their property to
3 this lady or this corporation.

4 THE COURT: Thank you Mr. Goldberg.

5 MR. GOLDBERG: You're welcome.

6 THE COURT: But this does not deal with the
7 issue raised by the Trustee.

8 MR. GOLDBERG: Well we object to the sale.

9 THE COURT: I understand your objection.

10 MR. FAVER: Judge, after lunch, will you give me
11 a brief moment to address some the practical issues that may
12 easily resolve this without the Court's intervention.

13 THE COURT: You may be able to, but you are
14 not going to be acting as an attorney for a committee.

15 MR. FAVER: That's understandable your Honor.

16 THE COURT: You can speak on behalf of
17 yourself. You can't undertake to represent anyone on legal
18 issues

19 MR. FAVER: I have no intention to either. I
20 plan to propose some things to the Court that may resolve
21 this more practically and easily for everybody.

22 THE COURT: Anything that makes sense, Mr.
23 Faver, we all are interested in a practical solution. I am
24 not trying to preclude Mr. Goldberg from asserting his
25 claims in an appropriate forum, but now is not the day to do

1 it.

2 MR. FAVER: I completely agree.

3 THE COURT: And if he has claims against Mr.
4 Brunesco, he can pursue those. If he has claims against the
5 estate, he can file a proof of claim. He doesn't have to
6 litigate it and bring a complaint. He has the right to file
7 a claim and state the basis of his claim for damages.

8 MR. GOLDBERG: Your Honor, if there's
9 bankruptcy fraud here, isn't it in your jurisdiction to --

10 THE COURT: If there are criminal activities -
11 - If you signed a consignment agreement and the goods were
12 caused to be delivered, I don't understand how you treat
13 that as fraud. You entered into a voluntary agreement where
14 you turned over possession of these goods. The issue of
15 title is a very different issue. She didn't come and steal
16 this stuff from you. She put it in her store. It was there
17 for exposure for a resale. I don't understand at first
18 blush how you can claim you were defrauded at the inception
19 of this transaction, and Mr. Goldberg I am not ruling on it
20 today.

21 MR. GOLDBERG: May I just say something. When
22 we visited the premises, a good portion of our property was
23 not there. It was missing. We can only assume that they
24 were offered for sale and sold, and we never saw one nickel
25 out of the proceeds.

1 THE COURT: That's your claim for damages. If
2 your goods are not there, you are not being dealt with in
3 this auction sale. You may have a claim for the recovery of
4 your proceeds. It has nothing to do with what is going to
5 be sold, when, and under what kinds of condition.

6 MR. GOLDBERG: Well, there are 200 other people
7 that have to be heard on the issue.

8 THE COURT: Why don't you let them represent
9 themselves. You are not the class agent here. If you
10 believe that your goods were sold, and you authorized her to
11 sell it, but she didn't remit the proceeds which she agreed
12 to, then you have a claim against the estate, and you might
13 have a claims against her individually, but she is not the
14 debtor in this case.

15 MR. GOLDBERG: But she is a creditor as far as
16 \$240,000 that she claims that gave to the estate out of her
17 own pocket. I would like to know if the goods that were sold
18 and the proceeds found their way into her personal assets
19 and now she is claiming she is a creditor of the estate.

20 THE COURT: You can bring objections to her
21 claims. I suspect that the Trustee will under some
22 circumstances treat her claims differently and at a lower
23 priority. If she engaged in practices that were severely
24 detrimental to creditors, then she runs the risks of having
25 her claims equitably subordinated as a remedy. So that

1 means, that she won't participate in any distributions but
2 that's --

3 MR. GOLDBERG: Your Honor --

4 THE COURT: Mr. Goldberg stop interrupting me.
5 I have already declared a recess. I understand that you are
6 passionate about this. You have made your presence known in
7 this estate. We have heard you loud and clear through all
8 of the signals you are sending out. You will have an
9 opportunity to deal with the Trustee on that matter, but the
10 question for today is if there are goods on the floor that
11 remain unsold, how should those be dealt with. And if your
12 stuff was sold, and you didn't get the proceeds, it has
13 nothing to do with the auction.

14 MR. GOLDBERG: Some of the goods were sold and
15 some of the goods we claim title to. We claim they are
16 still our goods, and they should not be sold; therefore, we
17 object to the sale.

18 THE COURT: Okay.

19 MR. GOLDBERG: Thank you, your Honor.

20 THE COURT: We'll be back here at 1:45 p.m.

21 MR. ACKERMAN: Quarter to, Judge?

22 THE COURT: You can do it in a half an hour?

23 MR. ACKERMAN: No problem, Judge, I just wanted
24 to make sure.

25 THE COURT: I'll see you at 1:45 p.m.

1 (Whereupon, a recess was taken.)

2 THE CLERK: The matter continues on Morgansen's
3 Ltd.

4 MR. COSTELL: May I proceed, your Honor.

5 THE COURT: Yes.

6 MR. COSTELL: Your Honor, there are a number of
7 items that I would like to get to before I give up my turn
8 at the lectern. One is again on a practical matter, your
9 Honor to consider, which is there seems to be so much lack
10 of clarity in the provisions as amended and the
11 implementation under the Bankruptcy Code, my question for
12 the Trustee would be why sell the consigned goods of those
13 who have made objections here today or prior to today. What
14 is the need for a sale and an auction in a general sense,
15 which I don't think has been established, and even if it is
16 established that a sale must take place, why sell those
17 consigned goods or those goods that are debated as to their
18 ownership, of those people who made objections.

19 If the Court determines that there should be
20 sale, I still would object why a sale would be held now. In
21 other words, if the Court -- I guess I am asking the Court
22 as a matter of relief to ask the Trustee to make a list of
23 those goods that are consigned by the parties who made
24 objections and to omit those from any order for sale or
25 auction.

1 In addition going over whether a sale should be
2 held in general at the present time, I think there is a
3 consensus having been at the lunchroom and speaking to
4 people that the season is now over. The season is over at
5 Labor Day and that it's been missed, and any attempt to rush
6 a sale now would be counterproductive. Certainly, a sale at
7 the location at this time would also be counterproductive
8 because many of these items that are on the premises have
9 been there for a long time. Some for a year; some for a
10 number of years. As one party put it everyone in
11 Southampton has seen these goods. They are not going to
12 sell.

13 THE COURT: What, everyone --

14 MR. COSTELL: Everyone in Southampton has
15 already seen these goods. They are not going to sell.

16 THE COURT: The question is whether they were
17 realistically priced.

18 MR. COSTELL: That is another --

19 THE COURT: I'm sure some of you have had the
20 experience of driving around town seeing a house being
21 advertised for sale, that you would like to buy and the
22 buyer is asking for a price that is way above market. So
23 you say, okay, I'll just keep driving by and when the season
24 ends, and the buyer has to get serious, then I'll make a
25 bid. I'm not going to be bound by what he says. Yes. I

1 have driven by and I've seen it. It's a nice house, but
2 he's asking for the moon, and I don't want to get into a
3 bidding contest.

4 MR. COSTELL: I understand and I can't negate
5 that argument, your Honor, but I think the converse also
6 holds true that the parties are concerned that at this time
7 and at this place, that whatever first person walks up and
8 offers you said asking for the moon; how about asking for
9 the sewer that they are going to get sewer prices instead of
10 reasonable fair market value prices.

11 THE COURT: The Trustee conducts every auction
12 under reserve. The Trustee is not going to sell these at
13 distressed prices, but the Trustee is not an operating
14 Trustee, and these are on leased premises, and the landlord
15 wants to be able to reclaim those premises so he is going to
16 be charging occupancy charges to the Trustee. The Trustee
17 will have to continue to maintain insurance coverage. It is
18 not cost free.

19 It may well be the case that the stuff should be
20 brought to Plainview or some substantial part of it. But
21 just because someone files an objection, doesn't necessarily
22 mean that I should pull that item from the sale.

23 I don't know whether the purported owner is going
24 to pay for storage. I am not going to let the owners take
25 it back into their own homes, and who is going to bear the

1 freight. Are the owners going to pay for it pending some
2 outcome?

3 What kind of liability does the Trustee incur to
4 those who want to pull their goods from the sale.

5 If you think I am going to let everyone object
6 take the stuff away and then try to continue to assert
7 jurisdiction when it is in 50 different places, and the
8 Trustee then has to go sue one of these "owners" to recover
9 the goods, that's not practical.

10 MR. COSTELL: I wasn't suggesting that it be
11 distributed to the parties, your Honor, but I was saying
12 that it does need to be sold now and as part of my argument
13 in talking about what the Trustee's responsibilities are,
14 the point of fact is if these parties win on the argument
15 that these goods were not subject to the Bankruptcy Estate,
16 it's irreparable harm to them that they will not be able to
17 receive these goods back, and they may get--and I hesitate
18 to say what the actual --

19 THE COURT: They will have an opportunity to
20 counter any bid. We've already talked about that.

21 First of all, it is not clear that the Trustee is
22 going to sell every item if it doesn't bring a sufficient
23 price. Those are mixed legal and business judgments. The
24 Court has to defer to the Trustee on consultation with an
25 experienced auctioneer.

1 You are dealing with a very experienced Trustee,
2 whose liquidated estates over many years, of all kinds of
3 varieties, and it is not this Court's function to second
4 guess the Trustee unless he goes way outside of the
5 boundaries.

6 Secondly, The Trustee has certain holding costs.
7 The Trustee's obligation is to liquidate these assets and
8 make a distribution. And if we are going to sell it under
9 commercial and reasonable terms, through a much more
10 aggressively advertised sale, there is a tendency of
11 bankruptcy sales to bring in all kinds of folks; and
12 sometimes, they get into bidding contests. I have seen them
13 here. I've been to auctions. I've been caught up in the
14 fervor, and I've paid more for things than I should have
15 paid for them. I want to win the game.

16 So, there are a number of considerations. There
17 are practical ones. And if after some determination, and we
18 can try to do it in some expedited basis, the Trustee will
19 have those funds. They will be in government insured
20 accounts and they can be returned to the owners.

21 So you have a number of opportunities to protect
22 your rights. If you think that these goods might be sold at
23 a distressed price, and you can't convince the auctioneer of
24 what the floor should be, then I guess you can protect
25 yourself by making a payment to the estate for the right to

1 recover. You'll have the good back. You will still have
2 the value there. You will have paid for this. If you
3 prevail on the legal issue, you will settle, and you will
4 get your money back. That seems to be the easiest thing to
5 do. But I can't -- I don't think it is fair under these
6 circumstances that the Trustee makes a prima facie case that
7 these are goods of the property of the estate. To hold
8 these goods hostage in a liquidating situation until we
9 determine all of these matters.

10 I assume you want to have an adequate opportunity
11 to assert your rights, but the bankruptcy mode very often is
12 the one I told you before. We transfer liens to proceeds
13 and then we fight over whether there is a bonafide claim of
14 ownership; and that's the most expeditious way. Is is the
15 best in all conceivable worlds. No. But we can't let the
16 goods be held hostage. You have to deal with it within
17 those constraints, and then we will be able to bring this
18 matter. We will have an evidentiary hearing. Each of you
19 will be treated separately with respect to your separate
20 facts; and if you want to resort to some alternative dispute
21 resolution mechanism, the Trustee may agree to that making
22 him submit these to a mediator, someone who has experience
23 in consignments, both a bankruptcy lawyer who has a decent
24 sense of auction sales and collectibles in this character.

25 I am sure there are persons who can help in this

1 situation. A number of persons other than Mr. Maltz who
2 specialize in dealing with antique good and others. So
3 there may be an opportunity to put together a panel so you
4 can arbitrate these things and mediate them with people who
5 know what they are talking about.

6 I'd appoint Ms. Cavanaugh to it, but she is the
7 Assistant U.S. Trustee. I assume she is not here to see the
8 sale with the artwork, although it would draw a big crowd.

9 I appreciate your argument, but I am trying to
10 work this thing through. The notion that you people can opt
11 out simply because you filed an objection; some of it not
12 accompanied by any law is not going to fly.

13 MR. COSTELL: Your Honor, let me move on to my
14 next argument which is that even if -- and assuming that the
15 sale is necessary for all the reasons you cited, that the
16 Trustee has admitted and presumably in his capacity as
17 fiduciary has identified the items that are inventoried to
18 the business as opposed to consigned goods or property
19 bailed or otherwise given to the company.

20 Maybe as a backup argument, I would say that why
21 is it that the inventoried goods, the good actually owned or
22 allegedly owned by Morgansen's couldn't be sold to meet
23 these obligations to allow the parties time to make their
24 legal arguments.

25 THE COURT: I don't know how much confidence the

1 Trustee has in what's inventoried and what's consignment.
2 He has been trying to give you people the benefit of notice
3 so that if there are no records at the company, you can
4 submit copies of your records to determine which category it
5 falls under. But I don't know what the breakdown is in
6 terms of value and amount of this so-called inventory.

7 MR. COSTELL: Well, whose burden is it to
8 establish that? Is it merely the Trustee's --

9 THE COURT: I'm not dealing with burdens at
10 the moment. If there is an inventory, clearly identified as
11 an inventory, that doesn't have any agreements attached to
12 it in written form called consignments or whatever else it
13 is, and the Trustee thinks that makes sense to sell that
14 inventory, he can do that. He doesn't need your permission.

15 MR. COSTELL: I agree. My question --

16 THE COURT: I don't know what the value is.
17 If the total amount of goods we're talking about has some
18 ballpark figure of \$250 unless it's enhanced, and the
19 inventory should be \$1,000, it may not make sense to have an
20 auction sale unless it is enhanced. The inventory should be
21 \$1,000. It may not make sense to have an auction sale. It
22 may make more sense to have a private sale on an above bid
23 basis. Because the costs of holding an auction will
24 substantially erode the recovery. But those are judgments
25 the Trustee makes; not the Court.

1 Have you identified a separate inventory, Mr.
2 Ackerman?

3 MR. ACKERMAN: We can't in fact when people were
4 going there to inspect what I was advised was that people
5 were saying I think that might be mine. I think I am not
6 really sure. We also have had many instances where people
7 have stated they believed their goods were sold and Ms.
8 Brunesco absconded with the money. We are trying to track
9 monies, and we will be pursuing that with vigorous --

10 THE COURT: But tracking the money for goods
11 that aren't there has nothing to do with an auction sale.
12 It's just about establishing claims. People file claims.
13 They file claims for damages. You have to document your
14 claims with documentation; specifically identifying the
15 items, if these goods are in effect refundable and you
16 really can't define the characteristics, and you can't
17 establish what it was that you delivered to Morgansen's
18 other than by some generic description. We'll deal with it.
19 They will be treated as co-mingled goods. I just don't
20 know. I am not going to guess what this stuff looks like or
21 how much is there or where it is, or whether it is stacked
22 in piles or on the tables. What has been exposed for sale
23 for a year at an unrealistic asking price.

24 The Trustee can't bear this burden of going
25 through this elaborate rationale; and unfortunately, that's

1 one of the risks you incur when dealing with someone who
2 might become insolvent. I can't recreate the universe as it
3 was before on the assumption that Morgansen's was always
4 going to be successful. She was insolvent for more than one
5 year. In fact, she was insolvent throughout this entire
6 operation. Yet, the goods remained there, and you didn't
7 make any efforts to have them returned if you could identify
8 them on the floor. So to some extent, you may be escoufed
9 from raising certain items. If you had a right to demand a
10 return and you made that demand and the goods were still
11 there, and are still there now, maybe that puts it in a
12 different situation, but you are going to have to document
13 that you made a timely demand for return.

14 MR. COSTELL: Under what theory your Honor?
15 What are we talking about?

16 THE COURT: Whatever theory you want to
17 advance. But you have to show an active demand for return
18 under your agreements. You can't simply assume that you
19 have the right to a return without any further proof.

20 MR. COSTELL: Well, the only impediment to that
21 your Honor is the fact that the bankruptcy interceded. We
22 weren't in bankruptcy, we wouldn't be having these issues.

23 THE COURT: Well, I could change that.

24 MR. COSTELL: It's sort of the mythological or
25 mystic argument that we were talking before what makes a

1 buyer, when is a buyer a buyer. I don't want to belabor the
2 points that I obviously take your Honor has obviously made a
3 decision on.

4 THE COURT: I haven't made any decision.
5 Look, until the fat man sits down, it's still open, okay.
6 Just like the baseball. When the fat lady stops singing,
7 it's over. I haven't stopped singing.

8 MR. COSTELL: I don't want to repeat argument
9 that have previously made, but let me ask you whether there
10 is any open discussion with regard to who has the burden of
11 proof establishing whether the debtor is an auctioneer.

12 THE COURT: Counsel, I may have mislead you to
13 think this is a debating society or a moot court. It is
14 not. Maybe you are not used to the way I have to try to get
15 at the truth or the law. There's a certain amount of
16 dialogue and exchange, and then I think about the arguments
17 that were made, and then I decide.

18 I don't come in here with my mind made up.
19 That's why we have hearings on notice. Any discussion who
20 want to have, you can have with the Trustee and the
21 Trustee's counsel. I don't preclude that from happening.

22 So, I am not going to answer questions. It's not
23 my duty to tell you what I think the law is.

24 MR. COSTELL: I agree your Honor. Let me close
25 just by saying that I think there are questions about the

1 procedure that people have raised that have not been
2 resolved. One is the short notice that were given to many
3 people, the lack of notice given to many others, and that
4 the timeliness of the sale is an issue that many objectors
5 have raised.

6 The other issue is the --

7 THE COURT: I haven't heard anyone tell me or
8 recommend and it's not to me, it's to the Trustee and the
9 auctioneer, what would be a more appropriate route. The
10 only thing you say is give me back my stuff. That's doesn't
11 deal with a mode of disposition in which maybe parties will
12 come to conclude that if a sale is conducted in other terms
13 that no one has proposed to the Trustee, it may yield higher
14 benefits to anybody or to everybody and then you have to
15 work through the costs, a costs benefit analysis. These
16 sales are not -- I can't suspend the operation in time. I
17 can't suspend the approval costs, so I have to make a
18 decision within real time.

19 And if you have a better way of disposing of this
20 inventory for want of a better term, to maximize the
21 proceeds, after you have that discussion based on whatever
22 expertise you have with Mr. Ackerman and Mr. Maltz. They
23 are all ears. They simply put up a proposed based upon
24 their judgment. They are experienced, and they have asked
25 me to approve it.

1 Unfortunately, because there are holding costs,
2 notice of these things tend to be expedited.

3 How much notice did you give them Mr. Ackerman?

4 MR. ACKERMAN: Judge, ordinarily I would give 2
5 to 3 days. Here, I gave 12 days and only after I filed a
6 list of all consignors.

7 THE COURT: Twelve days.

8 MR. DUBIN: May I say, your Honor, the day of
9 inspection was the first day --

10 THE COURT: No, I am not recognizing you yet.
11 We are going to do this in order. You will have a chance to
12 address the Court. Okay.

13 What's the provision under 363B? Isn't it 20
14 days notice?

15 MR. ACKERMAN: It is usually 20 days under
16 Bankruptcy Rule 2002; however, it can be shortened. I also
17 spoke with many people on the phone.

18 THE COURT: When did you first become the
19 Trustee, Mr. Ackerman?

20 MR. ACKERMAN: I believe on August 26th. We
21 submitted the application I believe it was filed on
22 September 16th. During that period, I probably spoke to
23 about 100 people, I think.

24 THE COURT: Next.

25 MR. DUBIN: Your Honor, I sent a great deal --

1 My name is Dubin, —A-U-R. D-U-B-I-N.

2 THE COURT: You have to speak louder. Your
3 name?

4 MR. DUBIN: Maur.

5 THE COURT: M-A-U-R.

6 MR. DUBIN: Dubin. D-U-B-I-N.

7 THE COURT: D-U-B-I-N?

8 MR. DUBIN: Right.

9 THE COURT: All right Mr. Dubin.

10 MR. DUBIN: I have assigned a great deal of
11 things to Mr. Morgansen's.

12 THE COURT: We need to know the items you
13 claim to own.

14 MR. DUBIN: I have a list. I went out to the
15 gallery the day they said that we should come, and I
16 identified each item that was mine. I showed them the
17 invoice where they were listed, and he put a tag on all of
18 those items that were mine. I did think it was not very
19 thoughtful of the Trustee to plan that visit on the first
20 day of the Jewish holiday when they know perfectly well that
21 most of the dealers that would be interested would be Jewish
22 and would not come.

23 THE COURT: I can't assume that.

24 MR. DUBIN: What?

25 THE COURT: I can't assume that the buyers are

1 going to be Jewish or the consignors.

2 THE COURT: In the furniture business in New
3 York. Are you blind?

4 THE COURT: What?

5 MR. DUBIN: Furniture dealers in New York not
6 Jewish.

7 THE COURT: Do you want me to decide -- are
8 you going to ask me to make a determination of their
9 ethnicity just by looking at them? Don't even go there.

10 MR. DUBIN: Sotheby's wouldn't have a sale that
11 day.

12 THE COURT: Fine. So if you couldn't make it
13 that day, you were able to make it, notwithstanding your
14 religious practices, I assumed the Trustee was simply trying
15 to get people access to the premises as quickly as he could.
16 So he picked a day.

17 MR. DUBIN: When the fewest people would come.

18 THE COURT: So he picked a day that he thought
19 would be available to folks. He wasn't making some
20 discriminatory statement with respect to the Jewish calendar
21 or the Islamic calendar or the Confucian calendar, or any
22 other calendar.

23 MR. DUBIN: There were 30 days prior and 30 days
24 after when they could have had that exhibition.

25 THE COURT: Thank you, Mr. Dubin.

1 MR. ACKERMAN: Judge, I didn't know who they
2 were, and also they could inspect at anytime after the sale.

3 THE COURT: What was the day that you held the
4 place open for inspection?

5 MR. ACKERMAN: There were two days, Judge. Last
6 Wednesday and last Friday, and I am Jewish.

7 THE COURT: Maybe you don't observe enough.

8 MR. ACKERMAN: I do observe.

9 THE COURT: Last Wednesday was a Jewish
10 holiday?

11 MR. ACKERMAN: No, Friday night, Judge.

12 THE COURT: So Mr. Dubin has marked his stuff,
13 and you've looked at his list.

14 MR. ACKERMAN: I never saw him. He didn't file
15 an objection that I know of.

16 MR. DUBIN: What are you talking about? I got a
17 notice that there was going to be an auctioneer, and I
18 should come out to the premises and identify which
19 merchandise was mine, which I did. He put tags on all of
20 the things which were mine. And the next thing I know they
21 want to sell my things to pay his other obligations. I
22 don't understand.

23 THE COURT: That's not the point. The point
24 is whether you've made an objection, and we didn't receive
25 anything.

1 MR. DUBIN: We mailed it to the Court and we
2 called the girl, and said that it probably would not be here
3 by today, because we mailed it on Monday.

4 THE COURT: You mailed it on Monday. Do you
5 have a copy of what was mailed?

6 MR. DUBIN: I think so.

7 THE COURT: Then show it to the Trustee so he
8 can make a determination of what your position is.

9 MR. ACKERMAN: Judge, what he is showing me is
10 a copy of my notice together with a copy of a proof of claim
11 which he has filed with the Court together with a list which
12 he circled items. No UCC's. No anything apart of that.

13 May I keep a copy? I don't know your name. Can
14 I write your name down.

15 MR. DUBIN: Yes.

16 THE COURT: Mr. Dubin, just out of curiosity,
17 what was the Jewish holiday on Wednesday?

18 MR. DUBIN: Rosh Hashana.

19 THE COURT: What?

20 MR. DUBIN: It was not on Wednesday. I was not
21 told we could exhibit on Wednesday. We were told Friday.
22 We were told the exhibit was on Friday from 10 to 12. I had
23 to leave Manhattan at six in the morning to get there. I
24 heard nothing about Wednesday. No one mentioned Wednesday
25 to me. I don't think -- I don't know who was involved.

1 THE COURT: But you got the inspection date in
2 your notice.

3 MR. ACKERMAN: No, Judge.

4 THE COURT: Okay.

5 MR. ACKERMAN: We didn't feel anyone was going
6 to ask for an inspection prior to the hearing. We thought
7 there would be an inspection after the hearing, if it was
8 approved. That's when it usually is. I never had an
9 inspection before a hearing before.

10 THE COURT: But you did make arrangements for
11 people to get access before the hearing?

12 MR. ACKERMAN: Yes. Two different days.

13 THE COURT: That wasn't publically announced,
14 right?

15 MR. ACKERMAN: It was set forth in the notice
16 that there could be inspection upon notification of Mr.
17 Maltz. Frankly it was a mistake about before the hearing.
18 When they made phone calls and pointed in out, I said to Mr.
19 Maltz you must make it available.

20 THE COURT: All right. Anything further, Mr.
21 Dubin?

22 MR. DUBIN: I guess not.

23 THE COURT: Thank you. Hand up what you have,
24 and we will make copies of it so I can have a copy, and
25 we'll have it filed downstairs. Okay? Hand it up. Mr.

1 Dubin, hand it up. Bring it here, so I can make a copy of
2 it. We will return it to you immediately. Thank you.

3 Next.

4 MR. DAVIDOW: My name is Wallace Davidow. My
5 client received the notice on the 25th of September, this
6 last Thursday. I haven't had enough time to do the proper
7 research, and I would like ten days to hand it additional
8 papers and a brief.

9 THE COURT: And what items does your client
10 claim?

11 MR. DAVIDOW: My client has a list of items
12 which is attached to the Objection. There is a total of 60
13 items. They have a value of about \$15,000 to \$20,000.

14 THE COURT: Okay. Do you have that list?

15 MR. DAVIDOW: It was submitted.

16 THE COURT: Mr. Maltz or Mr. Ackerman, did you
17 review the list?

18 MR. ACKERMAN: Who is your client sir?

19 MR. DAVIDOW: Evelyn Rupolo.

20 MR. ACKERMAN: Yes. I definitely knew about
21 Evelyn Rupolo. She was the one who objected on the basis
22 that it was unconstitutional.

23 MR. DAVIDOW: That's one of your objections.

24 THE COURT: And what's her other objection?

25 MR. DAVIDOW: Well according to the New York

1 annotations on that section of the law 2-326, it says that
2 the person making the delivery is protected where there is
3 adequate notoriety, where the person in possession is
4 generally known by his creditors to be substantially engaged
5 in selling the goods of others. Now, we know that
6 everybody, everybody around Southampton knows that
7 Morgansen's is in the business of selling the property of
8 others. And the creditors know that too.

9 THE COURT: I don't know why you assume that.
10 How would LIPA or Verizon or any other utility company know.
11 They just read the meters. They don't look inside the doors
12 to see what business is being conducted.

13 MR. DAVIDOW: There is a very big sign on the
14 premises that says auctioneer. Everybody knows that.
15 That's how all of these people got there. They saw the sign
16 that says auctions. So they bought their stuff there.
17 However, if your Honor questions the facts about that, I
18 would ask for a hearing on the subject.

19 THE COURT: I thought we are going to have a
20 hearing. I thought this was the hearing. But, you will
21 have an opportunity to submit a Memorandum of Law. Try to
22 keep your constitutional arguments to the end.

23 MR. DAVIDOW: Well, I think that a due process
24 does require a hearing.

25 THE COURT: We are going to moot that out Mr.

1 Davidow. You will have a hearing after you submit your
2 papers and after we have had a chance to review them. But
3 we are talking about litigation costs that will
4 substantially erode the value of these items, and that is
5 something you have to talk to your client about.

6 MR. DAVIDOW: Your Honor, these items are not
7 going to bring very much on October 31st. I live in the
8 Hamptons. I live in Amagansett. As a matter of fact,
9 before I lived in the house that I am in on the beach in
10 Amagansett, I used to rent it, and the season happens to be
11 from Memorial Day to Labor Day. After Labor Day, all the
12 New Yorkers go home and they send their kids to school, and
13 there is nobody left to buy this stuff.

14 THE COURT: Thank you. Anything else?

15 MR. DAVIDOW: That's about all. I'll submit a
16 brief. I have ten days for that, your Honor?

17 THE COURT: Yes.

18 MR. DAVIDOW: Also, I would like my client to
19 have an opportunity to go to the premises and inspect the
20 premises to see if her stuff is there.

21 THE COURT: Work that out with Mr. Ackerman.

22 MR. DAVIDOW: I can work that out with Mr.
23 Ackerman?

24 THE COURT: Yes.

25 MR. DAVIDOW: All right. Thank you.

1 MR. ACKERMAN: Judge, I just want to say two
2 things. If you wish, the official comment note that was
3 quoted was the old official comment.

4 THE COURT: I already got that.

5 MR. ACKERMAN: And the second thing is we have
6 after Notice of Hearing where there has been notice of
7 hearing is construed in 1 or 2 (1) of the Code.

8 THE COURT: I know what that is. I'm going to
9 give me a chance of submitting a brief. Okay, because these
10 are issues that appear to be fairly novel. That doesn't
11 deal with how we are going to deal with the inventory.
12 That's part of the problem.

13 Yes, ma'am.

14 MS. KESSLER: June Kessler.

15 THE COURT: Yes.

16 MS. KESSLER: On behalf of myself --

17 THE COURT: K-E-S-S-L-E-R?

18 MS. KESSLER: Right.

19 THE COURT: Go ahead Ms. Kessler.

20 MS. KESSLER: I have a question for the
21 Trustee. Have you gained access to the City vault?

22 MR. ACKERMAN: We have found out about the City
23 vault. Maybe you were the one who told us about it. And we
24 are trying to get in there. There is apparently some other
25 premises and there is a warehouse. I don't want to say more

1 on the record.

2 MS. KESSLER: I just feel that it is premature
3 to order an auction of merchandise, when the full value of
4 the estate or the items that are attachable to the creditors
5 are not even discovered at this time.

6 MR. ACKERMAN: Judge, I would require an
7 adversary proceeding. I think I'm probably going to do a
8 Writ -- if everything is what I think it is, and I'm doing
9 an investigation because of creditor who like her who have
10 told me.

11 MS. KESSLER: I've been told that at the time
12 one particular diamond that has not been returned to me was
13 in the City. It was in the City in the vault.

14 THE COURT: What kind of items do you have Ms.
15 Kessler?

16 MS. KESSLER: I have a little bit of a confusing
17 story. I will try to explain. I have one GIA certified
18 1.33 carat diamond with an insert attached.

19 THE COURT: A diamond ring.

20 MS. KESSLER: I was paid a check for this item
21 and an emerald ring that was sold on an auction supposedly
22 through a lot sale where they were both sold together, and I
23 was given a check for -- hold on, I have the receipt. I
24 think it is \$5,185. And then the check was returned, and
25 then it was replaced with several checks. I deposited one

1 for \$750. I have all the receipts that I can give you. One
2 for \$750 that was stopped payment on. This has been going
3 on for about two years.

4 THE COURT: Ms. Kessler, look I appreciate
5 that you believe that you have been miserably and unfairly
6 treated

7 MS. KESSLER: Oh, if you can just let me explain
8 the story, then you'll understand where I am coming from. I
9 will make it fast. Basically I got bad checks, and then she
10 told me that the party had not accepted the purchase and she
11 was going to return the items. I have been asking for them
12 to be returned since. I had spoken to Felicia at the
13 beginning of September. She advised me that she would get
14 my goods for me; the emerald ring and the diamond ring. And
15 then I got a letter about a Chapter 7. I have never been
16 given notification of a Chapter 11, and she was in
17 possession of the emerald, which I saw this summer in her
18 auction place, and in September when I saw her, she said she
19 was going to give it back. She now has told me yesterday on
20 the phone, that the emerald ring was sold on August 1st and
21 that the diamond ring is in the possession of someone, I
22 think a designer or somebody like that.

23 THE COURT: What?

24 MS. KESSLER: I think a designer or somebody
25 like that who she gave the goods to who was going to find

1 approving buyers.

2 THE COURT: To find a who?

3 MS. KESSLER: Approving buyers.

4 THE COURT: Approving buyers?

5 MS. KESSLER: People who are interested in
6 buying it.

7 MR. ACKERMAN: What designer did she have it was
8 in the possession of?

9 MS. KESSLER: She won't tell me the name. She
10 won't tell me the name who she sold the emerald to on August
11 1st. She did not tell me September 1 when I saw her
12 physically and said I want to pick up my stuff. She did say
13 that she had a good month in August and that she didn't know
14 how she would keep her doors open. Here she is and told me
15 that the diamond ring was in the possession of someone that
16 she gave several other items to that is refusing to return
17 it and that the police told her that it was a civil matter
18 and that a criminal matter.

19 I'm just opposing the auction sale because of the
20 disposition of my property is a little bit confusing at this
21 time. I have been told many things. I also feel, if I may,
22 that it would maximize the return to me as a creditor, just
23 to get my merchandise back and not to have it sold at
24 auction since it is worth more to me than it is worth
25 selling.

1 I also feel that in my interpretation of the UCC
2 law, Section 2-326 that my goods are always offered in the
3 two years that I have dealt with Felicia on a sale or
4 approval basis. She had never sold my goods on a retail
5 basis. The only time she sold my goods in a retail case was
6 through Angelo's which would still be as an agent. Just as
7 I give my house to an agent to sell, I don't give them the
8 ownership of my house. I didn't ever sell an item to
9 Felicia. She also took my item and then negotiated.

10 Okay. Let me just finish please. Since I have
11 sat here for six hours listening to everybody. The UCC
12 clearly states that if an item is sold for approval, as
13 Felicia was never a buyer to me. She was merely transacting
14 sales to buyers for me, the seller, that they are not
15 subject to Bankruptcy Court and they cannot be attached by
16 creditors. It clearly states this in the UCC Code.

17 You also state -- the Trustee states on Page 3
18 that the goods held on sale or return are subject to the
19 claim while in the buyer's possession. Felicia was never a
20 buyer in all of the dealings that I have had with her. She
21 was consistently pursuing diamond dealers, private accounts,
22 selling stores, doing auctions. The UCC also states that an
23 auctioneer that there is no sale until the gavel hits the
24 ground and the approving buyer accepts the piece. I don't
25 know the applicable law, but I believe that when you make a

1 sale to a buyer, that there is some sort of contract of
2 sale. There is some sort of payment upon receipt. These
3 were never my dealings with Morgansen's. They always acted
4 as an agent to sell my merchandise to other buyers. So in
5 my mind they were never a buyer as the Court has discussed
6 today.

7 THE COURT: You have a history of dealings
8 that you can document to the Trustee?

9 MS. KESSLER: I have it documented and with me.

10 THE COURT: Okay. Give copies to the Trustee.

11 MS. KESSLER: I also found that any of the items
12 that she sold in her store or had for sale were marked at a
13 very high reserve which is customary for auctioneer houses.
14 They are not really in the business of selling retail. So
15 they put it at a very high price as your auctioneer stated
16 that her prices are seven times as high. The intent is to
17 merely house it and have people viewing and then when they
18 go to auction, they can make a low bid and fight, because
19 they feel the value is one of substantial value basically
20 especially decorators who are using these goods.

21 Let me just look at my notes. I also find that
22 it is interesting that the auctioneer had stated that there
23 is about \$100,000 worth of property. When I spoke with
24 Felicia the other day, she said there is about \$600,000
25 worth of consigned property. It's basically my opinion that

1 this auction is mainly intended to pay a few creditors and
2 does not look at the value and assets of all of the people
3 who are also creditors who are the owners of these goods.

4 And I think it is disproportionate and unfair to
5 sell everyone's merchandise to pay the salaries or the LIPA
6 bills of a few people when it clearly can be shown that
7 these people have rights and ownership to this property.

8 I also don't feel I have never been told of a
9 Chapter 11. Felicia, I think it was in July that I saw her.
10 She still had my emerald ring in her hand. She did offer to
11 give it back. I don't believe it was her intent to defraud
12 people, but she did not tell me that she was in Chapter 11.
13 So, after she said she could barely keep her doors open, is
14 when I said I'll just take my goods back.

15 There was a third bracelet which she had given me
16 \$2,000 for, but she had told me that she was giving it to me
17 towards the diamond and emerald lot. So it was confusing --
18 the whole transaction was confusing to conclude. At this
19 point --

20 THE COURT: This is just supposed to be
21 argument. You are just testifying, and --

22 MS. KESSLER: Okay. I'm just --

23 THE COURT: She gave you a \$2,000 bracelet?

24 MS. KESSLER: No, she gave me a \$2,000 check
25 after the bounced check and the stock check and said that

1 was paying towards the diamond and the emerald.

2 THE COURT: And did that check clear or not?

3 MS. KESSLER: Yes, that check cleared. It
4 turns out now -- what is today? Tuesday or Wednesday. Well
5 I spoke to her on Monday the 29th, it turns out now that she
6 sold the diamond bracelet on auction which would be
7 consistent with the \$2,000 payment, and that's why she
8 didn't tell me about the Chapter 11 because she said at that
9 time, I wasn't a creditor.

10 But I have been requesting the goods for over a
11 year, and I have documentation of that. She just kept
12 saying it is in the City. A lot of people have purported to
13 be the owners of this property. There is a lot of gray
14 issues so I don't really know when in lies the truth. I
15 just know what she told me the other day, and what she has
16 told me in the past, which I have stated.

17 THE COURT: Okay. Thank you.

18 MS. KESSLER: I just want to make one more
19 comment that I believe the letter from the Trustee. It was
20 unusual. I had never received a Bankruptcy Notice that
21 basically told me why they were telling me I had no rights
22 to my goods. I think it intended to scare people away from
23 coming to court, but that's just my personal opinion.

24 THE COURT: Obviously, you weren't scared
25 away.

1 MS. KESSLER: Well, no. I just want to give you
2 the value on the emerald ring that Felicia stated that she
3 sold August 1st for \$2,040.00. That was \$2,400 sale less
4 15% commission. She has also devised that she would like to
5 tell the court and know how to handle the merchandise that
6 is at this other party's possession: the 1.33 carat diamond
7 after it is sold. The deal was 30% off Rappaport, which is
8 \$3,800 a carat. After her commission, my total due is
9 \$3,0070.20.

10 THE COURT: Okay. Next.

11 MS. KESSLER: Thank you.

12 MR. BATES: Good afternoon, your Honor. My
13 name is William F. Bates. I am here for the Estate of
14 Esther O'Keefe.

15 THE COURT: That's a probate estate?

16 MR. BATES: Yes, sir. Suffolk County.

17 THE COURT: Is the probate estate still open.
18 Is it still pending in Suffolk County?

19 MR. BATES: Yes, it is still open and pending
20 in Suffolk County. There has been some litigation over the
21 sale of some real estate, and that's why it hasn't been
22 closed.

23 THE COURT: Okay. So what does the Estate
24 claim?

25 MR. BATES: In my opinion, we are here to

1 balance the rights of different parties towards the property
2 that is there on the premises at Morgansen's on Route 27 in
3 Southampton. I think that's why Section 9-102 20 is there
4 to do. This defines what is a consignment and what is not.

5 I think we have three categories. We have sale,
6 bailment, and in the middle we have consignment. It seems
7 to me that the purpose of 9102 20 is to take certain of
8 these transactions which could be described as consignments
9 and to classify some of the as sales and some of them as
10 bailments.

11 Now a sale it would seem to be if there were a
12 sale, the property is there on the premises that the
13 landlord, a lender, LIPA, has a right -- a reasonable right
14 to rely on the presence of that property in granting some
15 kind of credit. However, under certain circumstances those
16 parties would not be justifiably able to rely upon the
17 presence of that property on the premises.

18 An auctioneer would be one such situation.
19 Clearly, everyone knows that an auctioneer is selling
20 property of others. As a matter of fact under the General
21 Business Law an auctioneer is required to maintain records.
22 But even if the parties selling, in this case Morgansen's,
23 is not an auctioneer, there is an additional category in
24 9102 (a) iii which says if I may be liberal in my
25 paraphrasing, a party like an auctioneer that somebody else

1 who is also holding a lot of property of somebody else; and
2 in that case, it would seem to me that the landlord, LIPA,
3 an ordinary creditor, anyone who can look at the sign in the
4 front of the premises, anyone who can read the telephone
5 book, anyone who looks at any of the advertising would know
6 that a good deal of the property on that premises did not
7 belong to Morgansen's and therefore could not reasonably be
8 relied on in order to back up any kind of debt or
9 obligation.

10 Therefore, I think what that section does is it
11 draws a line and helps us draw a line between somebody like
12 LIPA or the landlord and somebody like the rest of us. We
13 know it is our property; and those people who grant credit
14 to Morgansen's should know it too.

15 Therefore, the Bankruptcy Trustee is completely
16 unjustified in classifying what is here as a consignment as
17 a sale. There is no buyer. There is not even a transfer of
18 title. I think it is 2-1026 which says the essence of a
19 sale is a transfer of title. It's clear there is no
20 transfer of title here.

21 Morgansen's is an agent. There is never any
22 claim that there was a transfer of title. What we are doing
23 here in my mind is trying to classify an ambiguous
24 transaction, the consignment, and we have two ways to go.
25 We can either classify it as a sale in which case it seems

1 to be to be the general creditor is entitled to rely upon
2 the property that is there as a result of that transaction.

3 But the whole purpose of that -- we should be
4 going the other way. We should be looking at this as
5 strictly as a bailment. And that is what that purpose of
6 9102 20 (a) a is all about. You look at the type of person
7 that Morgansen's is, and then you decide which way to go.
8 The Bankruptcy Trustee only sees one way and that is to go
9 in the direction of a sale.

10 He should be going in the direction of a
11 bailment. If he goes in the direction of a bailment, we
12 should have our property.

13 Now the problem of a sale --

14 THE COURT: It doesn't look like any bailment
15 that I recognize. We have a whole series of transactions
16 under the UCC for warehouse receipts and bills of lading and
17 specialized commercial devices. But the bailment that I
18 thought we had in mind was when I park my car in a garage
19 and expect at the end of the concert to be able to come
20 back, open the door, and drive my car back home. And for
21 that, I paid a fee.

22 I bring my car to the garage for repairs. He
23 makes the repairs. If I don't pay, he has a garage man's
24 lien; but if I pay -- if all I am doing is delivering it for
25 servicing or repair, it is still a bailment. There is no

1 contemplation while I'm off playing golf in the Hamptons,
2 he's then going to turn around and sell it.

3 Then I have the entrusting situations, where it
4 is really a warning to those people who put their goods with
5 someone who sells goods of that kind.

6 So we have a common law of bailment. You'd have
7 to demonstrate to me that under the common law of the State
8 of New York, under any applicable non-UCC statutes, that
9 this kind of transaction which you are denominating as a
10 consignment is to be treated as a bailment.

11 There are not just two categories. There may be
12 multiple categories. And the question is which one does it
13 fall under, and it is not a question of balancing or rights.
14 The only persons who have balanced rights have in the
15 Congress and the State of New York, and then I have to
16 harmonize these diversion statutes. I am not hear to make
17 determinations based upon some intuitive sense of the
18 equities.

19 I have to first apply the law. Once I understand
20 it, and once I determine it's applicable to these facts.
21 And this is not a Court to which you can made a general plea
22 in equity that we have been wronged or we are not being
23 wronged by the Trustee. And based upon your argument what
24 constitutes natural justice, I should adopt that argument.

25 I may be wholly sympathetic with the frustration

1 of everyone of you here. This is a Court that deals with
2 nothing but fraud on a daily basis. This is the premier
3 commercial court on fraud. I deal with stock brokers who
4 file for Chapter 7 after their brokerages were closed down
5 by the securities regulators and the customers come in here
6 and assert millions of dollars of claims for having been
7 defrauded by their brokers. I hold about six of those
8 trials a year.

9 Then I have the Trustee's actions based upon
10 fraudulent transfers when the husband decides in the face of
11 having guaranteed business debts and having creditors being
12 to howl, he decides to transfer the property that he and
13 wife held as tenants by entirety to his wife, and he has the
14 bravado to call it estate planning. We make short work of
15 those.

16 I deal with fraud against credit card companies.
17 I deal with fraud by one partner against another.

18 But I am not free to form the remedy. The
19 remedies are given to me by Congress or by the State of New
20 York or by the Common Law. And when there is a conflict
21 between state law and bankruptcy law under the supremacy
22 clause of the United States Constitution, the bankruptcy
23 provision prevails.

24 So I don't want you to misperceive what my
25 concerns here are. The Trustee is trying to establish a

1 position. He's given notice. Some of you may think it
2 wasn't enough notice. I tried to suggest to you that
3 perhaps you ought to collaborate. We have people here whose
4 goods have been sold. We have persons here whose goods may
5 have been redelivered to a third party without their
6 authorization. There may be a myriad of facts.

7 But we don't have to talk for the moment about
8 goods that aren't on the premises in the Hamptons. That's
9 all we are talking about. And I tried to suggest to you the
10 Trustee is always available to make some kind of practical
11 accommodation. And maybe because we have been pursuing
12 these fascinating arguments, and we are not coming to any
13 immediate conclusion, some of you think maybe well I'm just
14 going to have to continue to assert my claim. I'm going to
15 take the position that the Trustee can sell it without
16 either my consent or the determination of the Court, and we
17 will reserve all of our rights to appeal.

18 And we are now going to spend more money in legal
19 fees than the items are worth. But people do things for
20 their own reasons. You are not going to teach the Trustee a
21 lesson. The Trustee is not Ms. Brunesco. The Trustee is
22 not the corporation. The Trustee acts here as a
23 representative of creditors.

24 And while you might be a creditor, it is not in
25 your providence to tell me that LIPA should have gone to the

1 store and read the signs. And that because they are on
2 notice, therefore, their rights are subordinate to yours.
3 That might be what you consider to be an equitable argument,
4 but it is not one that I can recognize.

5 So, if we have to have a hearing on what
6 creditors knew or what they generally knew, that's a matter
7 of proof. It's not a matter of argument, and it is not a
8 matter of an appeal to the courts sense of rightness or
9 fairness or what conscience dictates.

10 And I am sorry that you find -- some of you in
11 the audience find this frustrating. As if there is a magic
12 answer to all of this, and if I deserve to sit here wearing
13 this dress, that I ought to be able to answer it in 20
14 seconds flat. It's not that easy.

15 And I am not doing this because I like to explore
16 these nice issues. There are many issues I find far more
17 fascinating than consignments, bailments, and alike.

18 I would much rather have a hearing on someone who
19 is a complete con artist, but I am not indifferent to your
20 claims. Some of your have substantial value here that you
21 are trying to recover, and we want to try to deal with it on
22 an expedited basis. So if you want to submit a Memorandum
23 of Law, you can join with other counsel to do it within a
24 ten day period, if you don't think I have had an opportunity
25 to study your views based upon the case law. The Trustee

1 simply asked for an expedited hearing. Just because I grant
2 the hearing doesn't mean that I am going to make the
3 decision today and I am still asking for information, and no
4 one seems to want to talk about it.

5 Is there a better way of disposing of this
6 property with your rights preserved and we're simply going
7 to liquidate these items and reduce them to cash. So far,
8 some of you have told me I live in Amagansett, and the
9 season is over. Others of you have told me what's the
10 hurry, and you are not dealing with the cost benefit of a
11 sustained occupancy charge.

12 So if you have some practical ideas and I thought
13 Mr. Faver was going to come back and give me the instant
14 comprehensive solution, and when we get to his turn, maybe
15 he's going to be able to do this.

16 I don't know how many of you have had a chance to
17 talk to him and whether you think his idea is a good one.
18 But if you unhappy with the state of the pleadings, and you
19 want to file pleadings within ten days, whether you are pro
20 se, you are going to go out and get a lawyer. You are going
21 to collaborate in hiring the same lawyer or for lawyers who
22 already appeared, you want to file a memorandum. You'll
23 have it. You have ten days from today.

24 Anything further?

25 MR. BATES: Your Honor, again, I didn't receive

1 notice until Last Wednesday when I got a fax. Should we be
2 discussing with the Bankruptcy Trustee about having another
3 day to open the premises out there so that we can identify
4 what is yours.

5 THE COURT: That is something you should
6 discuss with him. Look, he's here in the courthouse
7 conducting meetings with creditors on a regular basis. He
8 is appearing before seven different judges. He also has a
9 private law practice. You have to work out something that
10 is mutually agreeable. I don't think the Trustee himself is
11 going to go out there. The question is whether an employee
12 of Mr. Maltz is going out there under some conditions
13 supervised by the Trustee. That's a practical matter. You
14 can do that today in the courthouse. I am not precluding
15 that. I don't think the Trustee is opposed to it. But we
16 are not coming back everyday of the week to meet everyone's
17 convenience and religious practices.

18 If there are another two days that are possible,
19 whether it's evening, night, morning, we'll work that out.
20 We are not trying to hide anything here.

21 Next. Sir.

22 MR. PAPE: Phil Pape representing myself. I
23 would like to give you a copy of Morgansen's consignment
24 agreement.

25 THE COURT: You should give one to the

1 Trustee. I'll accept a copy. I need you to tell me Mr.
2 Pape what is that you claim to be your property that you
3 believe has not already been sold.

4 MR. PAPE: I consigned for auction about nine
5 items, and I was able to go to the viewing on Wednesday.
6 Just by happenstance, I had been driving by there, and saw
7 that the door was open. I do not, in fact, receive
8 notification. Of my nine items, I couldn't find two of
9 them.

10 THE COURT: You found seven, but not nine.

11 MR. PAPE: That's correct. The other two may be
12 there, but I didn't see them.

13 THE COURT: The items you found that you
14 identified as your own --

15 MR. PAPE: I'm sorry.

16 THE COURT: The items that you identified, how
17 would you describe those?

18 MR. PAPE: They are described as a pair of
19 marble end tables, an iron marble top console, mirror, and
20 Victorian rocker, pair of marble top consoles, Hallstand
21 mirror, small pine table.

22 THE COURT: You're going too fast. Marble
23 something or other --

24 MR. PAPE: I can submit a copy of this to you.

25 THE COURT: So you have a report.

1 MR. PAPE: Yes.

2 THE COURT: And you have given that to the
3 Trustee or to Mr. Maltz?

4 MR. PAPE: No, I have not.

5 MR. ACKERMAN: Please, because if you didn't
6 get the notice, that means you are not my list.

7 MR. PAPE: Well, I would like to address the
8 notification process which I'm sure Mr. Ackerman has all of
9 our best interests at heart, but the notification process
10 really has not been terrific. I happened to go by
11 Morgansen's to see what was happening with my stuff, and I
12 saw a notice on the door. That was a few weeks ago. I
13 called the number on the door. I spoke then with a
14 gentleman who gave me Mr. Ackerman's name. I spoke with Mr.
15 Ackerman, and I didn't receive anything -- any information.

16 I called back again. Then I finally did receive
17 his I guess you would call that a brief. I have not
18 received a list of other creditors, and I think, your Honor,
19 you made a very good suggestion that perhaps the consignors
20 ought to get together and form a committee and try to get
21 more in lock step with this Trustee because it seems as if
22 the consignors are taking an adversarial position against
23 the trustee. The Trustee is trying to help us, and it
24 doesn't seem that the two parties are together at this
25 point. Perhaps if we had a better understanding, maybe

1 through the 341 Hearing or meeting that was supposed to take
2 place on August 9th, we could get a better understanding of
3 exactly --

4 THE COURT: Not August 9th.

5 MR. PAPE: I'm sorry, October 9th. We could get
6 a better understanding as to where this thing is going and
7 what we might be able to derive out of it.

8 THE COURT: Mr. Pape, I think that makes
9 sense. Look as far as the list of "consignors", Mr.
10 Ackerman, I assume, will file that list. It's probably
11 available in the courthouse. This isn't electronic filing
12 is it?

13 MR. ACKERMAN: Yes. I have prepared an
14 application and proposed order to change the matrix of the
15 court to set forth everybody that I know about.

16 THE COURT: But if you are not an attorney and
17 you're "owner of this property", you can't get access to
18 that list, can you?

19 MR. ACKERMAN: I am also going to ask in there
20 that the court establish a new bar date for people who
21 didn't get notice previously, and that I be authorized to
22 send out a Proof of Claim form with notice of the bar date.

23 THE COURT: But to the extent that Mr. Pape
24 would like to coordinate his activities with other persons
25 who he believes are similarly situated to him in the

1 language of the law, there will be a publically available
2 listing of this schedule. I don't think it is the
3 responsibility of Mr. Ackerman to send out the same list to
4 everyone on the list. That's not the function of the
5 Trustee, but if a few of you want the list, I suspect he
6 will make that accommodation. It may be appropriate to do
7 this at the October 9 hearing, but I have the distinct sense
8 that unless the Trustee has reserved the whole day.

9 MR. ACKERMAN: It's 2:30, Judge. I don't even
10 know if she is going to show, and I will say this. I am not
11 going to reveal my strategy on the record to Ms. Brunesco if
12 --

13 THE COURT: I understand that. But the
14 primary purpose of this is to give creditors an opportunity
15 to ask questions of the debt. Correct? It is not just your
16 party. It's their party. That's why it is called a meeting
17 of creditors; not the meeting of Trustees.

18 Mr. Ackerman, I am going to suggest that you talk
19 to Ms. Cavanaugh. We have facilities here. I don't know if
20 we ever used the ceremonial courtroom on the first or second
21 floor for these. I have another courtroom next door which
22 you can open up and if you want to schedule this on an
23 adjourned date and let everyone have it; and if you need to
24 resort to process to bring Ms. Brunesco here, then you can
25 do that. I assume there have been circumstances in which

1 you were a Trustee in a converted case because the debtor
2 already enjoyed the benefit of the 11, have an ability to
3 bring her in. And if you need an order from me, and you can
4 show that as extra authority, I would be happy to enter the
5 order, and we can let the US Marshal chase her down wherever
6 she may be.

7 Then the creditors can come and ask their
8 specific questions. I don't want to turn this into a lynch
9 mob. We'll have court security officers there, but it may
10 be more sensible in trying to pack the people into the fifth
11 floor meeting room when you have a half an hour to deal with
12 this case at most.

13 MS. CAVANAGH: Your Honor, we can work that out
14 because we can make of our larger meeting rooms available,
15 but if we see there is that much creditor activity, we'll
16 coordinate that with one of the deputies in the Clerk's
17 Office. But I do want to point out.

18 THE COURT: Identify yourself.

19 MS. CAVANAGH: Yes. Terese Cavanagh, Assistant
20 US Trustee.

21 THE COURT: You know about Mother Nature.
22 Don't mess with Mother Nature.

23 MS. CAVANAGH: Just for your information, my
24 position is with the Department of Justice. Office of the
25 United States Trustee, oversees bankruptcy cases and

1 administration. We are not connected with the Court. We
2 supervise the Trustees separate and apart of the function
3 from the Court. We come in, make a recommendation, but we
4 are not part of the Court. But I think for the purpose of
5 what this gentleman was discussing, I think the pro se, and
6 I am cautious to use words, consignors, artists, or whatever
7 the particular category you believe you fall into, be clear
8 that Mr. Ackerman, as a Trustee, represents all of you and
9 none of you.

10 You cannot ask him for legal advice. You may
11 need to retain separate counsel, but Mr. Ackerman has to
12 stay independent and impartial and neutral. So to the
13 extent of 341 meeting which essentially is a review and
14 investigation of why the debtor is here in Chapter 7, that
15 is what Mr. Ackerman's function is; it is not to give legal
16 advice. I just want to be clear. Thank you.

17 MR. PAPE: I appreciate that. In my limited
18 experience with some of these things, I just think that it
19 would be more wise for us as consignors and the Trustee to
20 be on the same page rather than end up suing the Trustee in
21 the future potentially. And certainly that possibility does
22 exist. I think that the process --

23 THE COURT: How can you sue the Trustee?
24 Presumably we have a determination here in which you are a
25 party. The Trustee is a party. You can only sue the

1 Trustee for gross negligence or willful conversion. If he
2 is acting in his capacity as the Trustee and acting with the
3 body of law, he has qualified immunity.

4 MR. PAPE: Certainly, wouldn't we have a
5 potential claim against the Estate?

6 THE COURT: Yes, but that is not suing the
7 Trustee.

8 MR. PAPE: Then I misspoke. Then I would say we
9 would have a potential claim against the estate.

10 THE COURT: You may have an actual claim
11 against the estate. You will have an opportunity to file a
12 Proof of Claim. The Trustee will have an opportunity to
13 review it. Often times, he doesn't file objections to the
14 Proofs of Claim because his primary concern is to maximize
15 the money and get the distribution to creditors. But there
16 are a number of parties and interests who have the right to
17 object to a claim. And then you have to try to document
18 this claim to the fullest extent you can. It's not just a
19 one page piece of paper. It requires substantiation.

20 MR. PAPE: If I could just repeat. I agree
21 with that, and I do agree that that we can have a lynch mob.
22 I think that we should form a committee. I think that we
23 should have our own representation. I think a number of
24 people in this room that are consignors are already
25 beginning to form that group.

1 THE COURT: Let me ask Ms. Cavanagh, because
2 with respect to official committees of equity security
3 holders or of unsecured creditors, it is not the
4 responsibility of the Court to form the committee or to
5 determine its membership. It's the charge of the US Trustee
6 which would come under Ms. Cavanagh's jurisdiction.

7 Have you ever appointed a creditor's committee.

8 MS. CAVANAGH: In Chapter 7, no, your Honor, and
9 I would be concerned in this instance because we have mixed
10 constituencies that they may or may not fall into a category
11 that would be appropriate for a committee. It does not mean
12 that a committee cannot be formed on their own independently
13 and retain counsel.

14 THE COURT: All right.

15 MR. PAPE: There appears to be quite a bit of
16 dissension here today, and most of it revolves around the
17 requested sale of merchandise or goods that are being held
18 at the Morgansen's facility in Southampton. My request, and
19 I think it is consistent with a number of people in this
20 room that the sale be held off, that it is premature and
21 maybe ultimately going to happen. I'm sure it will. But at
22 this time, I really haven't seen myself enough information
23 to be able to agree with it. We don't know what the values
24 are of the merchandise that are contained within the
25 building. We don't have a clear understanding as to the

1 outstanding secured debt. We don't have an understanding as
2 to what people, meaning the consignors, believe their
3 merchandise is in fact worth. There seems to be a lot of
4 unanswered questions; yet we are forging ahead with this
5 sale.

6 Someone has mentioned of the fact that these
7 goods are there piled up all over the place. There is no
8 room for an auction sale. I think we need an opportunity to
9 come up with some solutions. I think a lot of people have
10 put forth the obvious problems, and I think through the
11 formation of this committee, and by postponing this, not
12 allowing this sale to go on as scheduled, perhaps we can
13 come back to the Court with some suggestions and a meeting
14 of the minds that might make sense for both secured and
15 unsecured creditors as well as consignors and the Trustee's
16 office.

17 THE COURT: And what is your occupation, Mr.
18 Pape?

19 MR. PAPE: Builder.

20 THE COURT: Yes?

21 MR. PAPE: I'm a builder.

22 THE COURT: You are providing affordable housing
23 on the East End?

24 MR. PAPE: Not at this time.

25 THE COURT: Are your sales down?

1 MR. PAPE: Not at this time.

2 THE COURT: Because we were trying to figure
3 out whether the East End was still alive. We kept on
4 getting all kinds of conflicting reports. The weather was
5 horrible, but it didn't seem to me that there was such a
6 high vacancy rate for summer rentals. That was one of the
7 questions. Did it fill up this summer with rentals and the
8 developers are opening new tracks?

9 MR. PAPE: Sales were okay, but rentals were a
10 little off.

11 THE COURT: They were?

12 MR. PAPE: Yes.

13 THE COURT: Are you a member of the Chamber of
14 Commerce or something of that sort?

15 MR. PAPE: No.

16 THE COURT: When you compare it to five years
17 ago, where the streets empty or was it fairly crowded?

18 MR. PAPE: It was still crowded.

19 THE COURT: And we didn't have any instances
20 this summer where people were being backed into? I'm glad
21 we had a happy summer. And did you see Steven Spielberg and
22 his family?

23 MR. PAPE: No, I didn't.

24 THE COURT: They didn't come out this summer?

25 MR. PAPE: I didn't see them. They may have

1 come out.

2 THE COURT: Is Martha Stewart around in
3 Amagansett? I bet Mr. Davidow has her tracks. It's a good
4 thing that her problems with the authorities didn't adverse
5 the effect of prices in Amagansett.

6 MR. PAPE: If I could just say one last thing.
7 In respect to Morgansen's being an auctioneer, I just have
8 this consignment agreement and the word auctioneer is all
9 over it. I think it is so clear. It is plain as day at
10 least in my opinion and I would just like the Court to take
11 a copy of this, if possible.

12 THE COURT: Well, if it is clearly an auction
13 agreement, and it just happens to be improperly entitled
14 consignment agreement, then the Trustee would have to made a
15 determination; ultimately I will have to make a
16 determination just what kind of agreement it is. And I
17 agree with you. If it is an auction agreement and that's
18 the primary tenor direction or thrust of it, then
19 notwithstanding how it has been labeled, we may make have to
20 conclude that it's an auction agreement. But that's the
21 question of reviewing the agreement, making sense of it to
22 the extent that it is ambiguous, having a hearing to produce
23 the evidence.

24 MR. PAPE: I can only say that my intention was
25 that I was consigning my goods to auction.

1 THE COURT: The problem is when you are doing
2 that, you are mixing what should be very separate kinds of
3 terms. But if we have some kind of third speeches of
4 agreement, I would have to decide what category it fits
5 into, and then I'll take into consideration the relevant
6 public policies both under the Code and the UCC, because it
7 may not be either a straight out plain vanilla auction
8 agreement. It may not be a straight plain vanilla
9 consignment agreement. And then you will be able to argue
10 what is the interpretation of that agreement as that
11 reflects the intention of the parties.

12 MR. PAPE: Thank you.

13 THE COURT: Anybody else? Mr. Faver, do you
14 have --

15 Yes, Ms. Kessler?

16 MS. KESSLER: I have a question. I just need to
17 know how I should file based on the information I have been
18 given because it is conflicting. I am a little confused.

19 THE COURT: You can go down to the Clerk's
20 Office, ask them for a Proof of Claim form. You can go
21 through it, and you should be able to fill it out as best
22 you can. It is supposed to be in plain English. It is
23 supposed to be available for non-lawyers.

24 MS. KESSLER: No, but I'm saying since I was
25 told it was sold, got a check, told the buyers refused it,

1 received money, got the stock payment, then I received
2 payment, what did it go to. Now I'm told this one is at a
3 third party. This one now disappeared. Did I sell it. She
4 never mentioned it before. So, I don't know to file this.

5 THE COURT: I can't give you advice on how to
6 file it, but I can tell you that it is primarily a notice
7 form supported by the relevant documents.

8 MS. KESSLER: Does the Trustee tell me who the
9 third party is from Felicia?

10 THE COURT: You simply assert your claim
11 against the estate based upon the best information you have.
12 You support it with whatever documentation you have. It is
13 not a lawsuit. The allowance and disallowance of claims is
14 supposed to be done as uncontested matters or contested
15 matters. We are not supposed to turn these into separate
16 lawsuits. So you don't have to file the equivalent of a six
17 count complaint. You can put it in the narrative term as an
18 attachment with your exhibits. But there is a form that you
19 have to file and you can get that in the Clerk's Office on
20 the second floor. They will give you the form. They can't
21 tell you how to fill it out. You can go to the library on
22 the 11th and 10th floors. You can ask to speak with Astride
23 Stalis who is the Circuit Court Assistant Librarian, and she
24 has a number of books that we have helped her collect for
25 pro se litigants, credits and alike.

1 MS. KESSLER: My question was more towards the
2 estate, the perfecting information of what the owner has
3 told me. Can I get the name of the parties that she gave it
4 to so I can assert my claim.

5 THE COURT: I am simply talking about your
6 ability to assert a written proof of claim, and I'm telling
7 you those forms are downstairs. There are books upstairs in
8 the library open to the public that are guides to bankruptcy
9 proceedings. they are guides to people how to fill out
10 claims. What it means to be a debtor. What it means to be
11 a secured creditor, and you just go upstairs and tell her
12 what your concerns are, and she'll point you in the
13 direction, and you may find some of the answers in that
14 book.

15 And that goes for all of you. This is a public
16 courtroom.

17 MR. FAVER: Judge, to more thoroughly answer
18 your question from earlier. I develop senior housing 55 and
19 older.

20 THE COURT: What's that?

21 MR. FAVER: I develop senior housing 55 and
22 older, active adult communities.

23 THE COURT: It's the only kind I know.

24 MR. FAVER: In terms of affordable housing, only
25 when --

1 THE COURT: How come I turn around and all my
2 neighbors seem to be much younger than 55. Is that because
3 they have second wives. Is that it?

4 MR. FAVER: Those are perhaps more difficult
5 questions that we have been presented here today, Judge.

6 THE COURT: All I can find in new construction
7 are leisure communities, adult communities, assisted living
8 communities, and developments of housing that are in excess
9 of 6,000 sq. ft.

10 MR. FAVER: Are those for seniors as well?

11 THE COURT: I don't see any affordable housing
12 being built on Long Island for lower middle or middle class
13 citizens who want to work out here and live out here because
14 the average cost of a private residence in this part of
15 Suffolk County is well in excess of \$300,000. So I don't
16 see any housing being built that meets the needs of people
17 who are earning a gross income of \$60,000 to \$80,000 a year.
18 So I am hearing that the sons and daughters who went to the
19 local high schools can't afford to come back to the
20 community, join their parents other than to move in.

21 MR. FAVER: I understand there is actually some
22 good developers doing some great affordable tax credit
23 housing out here to help address that issue.

24 THE COURT: I saw some up the street that was
25 church affiliated on Carleton Avenue, but I haven't seen

1 very much. We thought by moving out here, we would
2 stimulate economic development, and we would make a major
3 impact. I haven't seen any major impact with us being here,
4 and I have been here for over three years.

5 MR. FAVER: It's a shame. Hopefully, it will be
6 forthcoming, but the way those tax credit programs are
7 structured, there should be some really nice affordable
8 housing given the demographics and specifically the incomes
9 of the --

10 THE COURT: So what should I be paying for
11 rent for a two bedroom, one bath?

12 MR. FAVER: I am not familiar with the market
13 out here, Judge.

14 THE COURT: I know I couldn't afford your
15 market.

16 MR. FAVER: No, actually I am in Upstate New
17 York so it is a less expensive market, substantially, and
18 affordable housing there is.

19 THE COURT: So what's your proposal.

20 MR. FAVER: Well before I left the practice of
21 law, Judge, I actually was a lawyer with the Department of
22 Justice in Washington in the Civil Division, and it is a
23 shame that my former colleague wasn't here earlier for the
24 lively discussion we had about the legal issues. Because I
25 think they are interesting. I think we do have a great

1 legal issue here; and of course, it gets resolved in favor
2 of those people who are objecting. In my reading of that is
3 consistent with a number of commentators and alike and in my
4 papers.

5 THE COURT: You must be from Washington. You
6 talk like a politician. What's your proposal?

7 MR. FAVER: Well, of course, we are not here
8 just to resolve disputes which require the resolution by
9 academic legal opinions but hopefully a practical resolution
10 that solves it for everybody with some degree of finality.
11 And if we can somehow carve out --

12 THE COURT: How long did it take you to try
13 your cases?

14 MR. FAVER: I'm sorry Judge.

15 THE COURT: How long did it take you to try
16 your cases? Your opening arguments must have gone for four
17 days. Cut to the chase, Mr. Faver.

18 MR. FAVER: If you can somehow carve out the
19 very few objectors. We are talking about 600-700 items and
20 everyone has conceded that not all of those items would sell
21 in the sale anyhow. There is going to be leftover items.
22 We can't be possibly talking about a whole lot of items,
23 Judge. From those few objectors who are here, if they can
24 be carved out. I think the one important thing is we are
25 entitled as far as I can tell to return of our goods if we

1 prevail on this legal argument; an issue which we discussed
2 earlier today. And if that is the case, then the better
3 approach would be not fund from the potential proceeds from
4 the sale, but the goods themselves in escrow so to say, and
5 being it is such a small portion when you consider the
6 objectors of the overall number of --

7 THE COURT: Mr. Faver, you are all in the same
8 boat, and Mr. Pape didn't discover it until he drove by
9 recently, what the Trustee I think is suggesting implicitly
10 that he doesn't want to wave the flag around is that he
11 wants to make sure that all of the consignments if they are
12 consignments have been reviewed, that everyone be given
13 adequate notice to the sense that he can dredge that up, and
14 I don't think he's going to let you people be at the top of
15 the line, because your rights aren't any better than any
16 other's rights. And Mr. Pape never got notice and the
17 Trustee wasn't aware of his interest, it would be unfair to
18 persons in his shoes who didn't have the fortune of driving
19 by to be put in the position in which their rights can't be
20 articulated. So the people who were sturdy enough to come
21 here today on short notice get preferential treatment. That
22 is not just fair.

23 MR. FAVER: Well, if I understand your view,
24 Judge correctly, then clearly

25 THE COURT: I don't have a view. I am just

1 raising a question, Mr. Faver.

2 MR. FAVER: The question that you raised
3 clearly would then go to the suggestion and notion that this
4 whole sale be halted until proper notice is given to all of
5 the consignors and which we know there are 300.

6 THE COURT: Yes, but I'm going to let Mr.
7 Maltz testify today briefly, and you will have a chance to
8 ask him questions. I need to hear from him about the
9 seasonality of this sale because the extent to say that no
10 demonstration has been made, the only reason no
11 demonstration has been made is that Mr. Ackerman has been
12 dealing with these legal theories and hasn't had an
13 opportunity to put a witness of the stand to testify in
14 support of his proposal. So if you don't have a better
15 device other than let's not go forward with the sale, then
16 we'll call Mr. Maltz to the stand and whoever else Mr.
17 Ackerman is intending to call. We'll hear those proofs, and
18 you will have a chance to examine him. Okay?

19 MR. FAVER: Let me make sure I understand
20 exactly what it is you're saying, Judge. With the sole
21 question that Mr. Maltz would testify toward is the
22 propriety of fairness of the sale at this given time?

23 THE COURT: Let Mr. Ackerman put on his
24 proofs. He is the one who brought him here.

25 MR. FAVER: So in other words, he is not going

1 to put on his proof then as to this issue on consignment,
2 whether they be factual or legal. That is going to be put
3 off to another time. Correct?

4 THE COURT: He's not here to determine that
5 legal issue. Correct. So why don't you just wait and let
6 Mr. Ackerman ask the questions before you start putting
7 limits on them. I am not making any decisions now. I have
8 to hear some testimony and one of the issues is whether it
9 is in the best interests of the creditors of the estate, and
10 some of you may be creditors, whether you like it or not,
11 and I want Mr. Maltz, if he is going to be the one
12 testifying to demonstrate to the Court in open court, why
13 this sale should be held on an expedited basis, what the
14 carrying costs are. He already began to represent that it
15 wasn't under oath, the costs of moving this to Plainview or
16 some other location.

17 So I have to make a determination based upon
18 certain facts. The only way I can do that is to have a
19 witness testified and it may be the case that he convinces
20 me that it should be a sale of the character that he
21 decides, and then I have to determine given all of the other
22 considerations, whether it has to be held, even though there
23 may be costs associated with it.

24 So we can take advantage of the October 9
25 hearing. I am not trying -- Listen, and I'm telling you for

1 the last time. I am not trying to jam anybody here. That's
2 not the purpose of this hearing, and it is not the intention
3 of the Trustee. He just wanted this brought to the
4 attention of the Court with as much notice as he could
5 provide so that we can begin to address these issues.

6 MR. FAVER: I guess what I'm confused about,
7 Judge, is why is it as the first attorney after the break
8 suggested, we can't simply carve out the items that are in
9 dispute that may potentially prohibit --

10 THE COURT: Because I have already answered
11 it. I am not going to prefer some of you who are here today
12 to the detriment of all others who are similarly situated.
13 I am not going to let the people like Mr. Pape --

14 MR. FAVER: If they received notice and they
15 waived their right to appear or to otherwise object --

16 THE COURT: I'm not making any determinations
17 of waiver. I haven't heard the Trustee make an argument for
18 waiver. This is the first time I've considered it. It is a
19 new issue for me. We are dealing with a very large number
20 of persons. We are dealing with some fairly small values in
21 terms of --

22 MR. FAVER: Which is why in my motion I
23 suggested the idea of a committee, a designation of a
24 committee.

25 THE COURT: Okay. I understand that, but I

1 may not have the authority to appoint a committee.

2 Sometimes I just let --

3 MR. FAVER: I guess -- I'm sorry Judge.

4 THE COURT: Let me finish and you're done.

5 Sometimes I let people form their own organizations because
6 they have a superior way of dealing with this, and my
7 authority under the Bankruptcy Code is limited as is Ms.
8 Cavanagh's. This is a very unorthodox situation, okay,
9 because some of you are trying to assert what your legal
10 interests are.

11 MR. FAVER: And it may require an unorthodox
12 solution perhaps given the circumstances.

13 THE COURT: I'm not pulling the inventory from
14 sale today. Mr. Maltz. Thank you Mr. Faver.

15 Whereupon,

16 DAVID MALTZ,

17 having been first duly sworn, was examined and testified as
18 follows:

19 CLERK: State your name for the record?

20 THE WITNESS: David R. Maltz.

21 DIRECT EXAMINATION

22 BY MR. ACKERMAN

23 Q Mr. Maltz, what is your occupation?

24 A I am a licensed auctioneer.

25 Q And do you work for a specific company?

1 A David R. Maltz & Co., Inc.

2 Q Where is that located?

3 A In Plainview, Long Island.

4 Q Have you been engaged as an auctioneer in any
5 bankruptcy sales before?

6 A Many.

7 Q Would you give an estimation?

8 A The number of bankruptcy sales I have been
9 retained in?

10 Q As auctioneer.

11 A As auctioneer, probably in excess of 1,000. I
12 have been doing this for 24, 25 years.

13 Q And I believe you were working for other
14 auctioneers before you opened your own practice?

15 A Yes.

16 Q So you were engaged in auction sales prior to the
17 time you opened your own practice?

18 A That is correct.

19 Q And how often have you been engaged in being an
20 auctioneer for antiques, jewelry, et cetera?

21 A On a regular basis for the past 25 years. My
22 practice primarily is debt related type sales. I work for
23 lending institutions, government agencies, bankruptcy
24 trustees, and a like. So we get a wide variety of range of
25 merchandise to sell which gives us a very large database

1 from selling the contents of homes to homes to factories to
2 many jewelry stores, antique stores, retail type stores of
3 every type.

4 Q Now I consulted you about Morgansen's. Did you
5 have an occasion to visit the premises?

6 A Yes, I have.

7 Q And you secured the premises, I believe?

8 A Under your direction, that is correct.

9 Q Now, you've reviewed all of the items in the
10 premises?

11 A All of the items would probably not be an
12 accurate statement. I walked through the store on several
13 occasions. We have not spent a considerable time that will
14 be necessary, labor, in order to lot and catalog waiting for
15 a determination from the Court because there really is no
16 sense in spending estate money until we know what exactly we
17 are doing with these items. It could be a duplication of
18 work if that does wind up having to be moved or if items are
19 given back to people.

20 Q One of the questions that has come up today is
21 whether we should hold the sale in the Hamptons or whether
22 we should move it elsewhere to maximize value, et cetera.
23 First, what is your opinion, as to the cost of moving these
24 items?

25 A Well, besides the costs associated with moving

1 the items, we would have to find a mover who would be
2 willing to move it and not get paid until after we have an
3 auction and there was some sort of estate to pay him. It is
4 not as if we can go out and get three estimates and choose
5 the lowest price of an insured, bonded mover that we are
6 comfortable with because most movers want to get paid
7 immediately upon the completion of the job. This will be a
8 substantial job because of the packing and wrapping that is
9 necessary in order to secure and preserve these assets and
10 make sure there isn't any breakage. A lot of these items
11 are very fragile. We have chandeliers. We have art work.
12 We have all sorts of china.

13 I have not spoken to movers, but in my years of
14 having things moved and stored, I would say that you are
15 looking at a minimum of \$15,000 to probably \$25,000 to move
16 and store these assets for a 30 to 60 day period. In
17 addition, the labor from my end would be substantially more.

18
19 Right now everything is laid out in the store and
20 is displayed the way we would probably display it to sell.
21 Yes, we would have to move some things around and make some
22 room, but it is not going to be as time consuming or labor
23 intense as unwrapping everything after it has been moved by
24 a mover and placed in a pile. Then my people would have to
25 go in and unwrap everything and re-set it up for sale.

1 I mean the way it is set up in the store now, it
2 looks the best it will ever look. So you are going to have
3 the additional labor to move it, the additional labor to set
4 it up if it is moved, plus the costs associated with moving
5 it.

6 Everyone is concerned that the season is over.
7 People travel from all over for auctions. When we run
8 auctions, we have people come from all over the country,
9 depending upon the item that is being sold.

10 If there is a bankruptcy sale of a large quantity
11 of antique type of goods, people will come from Manhattan
12 out there. It is not that difficult for someone to get in
13 their car and drive two hours and be there. The sale will
14 be well advertised, well publicized.

15 Can it be moved? It certainly can. I can move
16 it to my warehouse as I stated earlier. It is much more
17 convenient for me and my people if I do that. We don't have
18 to drive 45 minutes or an hour to go out there, but I don't
19 think it is in the best interests of the estate. I think it
20 can be done from there. It may have to be done in two sales
21 rather than one sale. There is basically one area upstairs
22 in the back room that is just loaded floor to ceiling with
23 items, but those items looking the room don't appear to be
24 that valuable anyway. It is primarily chairs and wood type
25 of things that she probably just purchased at an auction

1 someplace else. We did find some receipts for items that
2 she purchased.

3 I would suggest that we do it there. The fall
4 season, there is still plenty of traffic out there. I do
5 not live out there, but I do travel out there several times
6 a year. I think if we have signs on the property. We
7 advertise it locally. We advertise it to -- I have a list
8 of her customers. I have my list of customers.

9 As I stated before, I have no problem
10 anticipating over 100 people showing up at this auction
11 sale.

12 THE COURT: How large is your database on
13 customers for antiques, jewelry, and art work.

14 THE WITNESS: I would say several hundred at
15 minimum.

16 THE COURT: And this is in the greater
17 metropolitan New York area?

18 THE WITNESS: This is people in the greater
19 metropolitan area or they could be from out of state if they
20 attended other sales, Judge. Basically, the list is
21 created from people who have attended prior sales.

22 THE COURT: Okay, but what you are talking
23 about?

24 THE WITNESS: The tri-state area.

25 THE COURT: So we might draw persons from that

1 unmentionable jurisdiction from across the river, New
2 Jersey, right?

3 THE WITNESS: We may get some very nice folks
4 from Connecticut also.

5 THE COURT: Okay. So you would advertise in
6 Westchester County?

7 THE WITNESS: Primarily we would advertise in
8 The New York Times. We would a lot of direct mailing. We
9 would advertise in local papers depending upon what time
10 constraints we had and the way the publications fell out.
11 There are some antique publications.

12 THE COURT: But when you start talking about
13 labor costs to lot and tag and to inventory, even at the
14 present location, then you talk about advertisement beyond
15 your database that is supposed to attract people from the
16 tri-state area, when it is at least 100 miles from the East
17 River to the Hamptons, the question is what are your costs
18 going to be aside from -- Let's assume you're talking about
19 moving. Your labor costs to set up this sale is going to be
20 what if you do it on two separate occasions?

21 THE WITNESS: The labor to set it up or the
22 labor to set it up, run an auction, and handle deliveries?

23 THE COURT: From start to finish in place
24 where it is.

25 THE WITNESS: I would estimate that it would

1 probably be in the neighborhood of \$4,000 to \$5,000.

2 THE COURT: Okay, and the advertising costs?

3 THE WITNESS: Probably similar. Normally I
4 prepare an advertising budget and send it to the Trustee
5 with publications and get their approval.

6 THE COURT: So, we're talking about \$10,000 in
7 transaction costs for sales. Now if you say this isn't
8 seasonal, why isn't the argument in then let's hold it in
9 November, let's hold it before the snows fall, if there are
10 any snows?

11 THE WITNESS: Because there are many more
12 people traveling out there this time of year. They're still
13 apple picking, pumpkin picking. There still is a lot of
14 traffic out there.

15 THE COURT: Okay, but people travel to pick
16 pumpkins and apples. Those are the kind of people who draw
17 into art sales?

18 THE WITNESS: You draw everyone, Judge to
19 auction sales. I'll take anyone who wants to come in. If
20 they want to buy something that is \$100 or \$100,000. They
21 are all customers. They are all buyers.

22 THE COURT: Look, if I'm out on a Sunday drive
23 or a Saturday drive, and I'm picking pumpkins, and I have
24 three kids in the car eating ice cream and cookies, trying
25 to keep them from tearing each other's hair out, when I go

1 out on the North Fork, you're not a North Fork kind of guy.
2 These people aren't either. But this is pie place Bryn Myr.
3 Okay that's on the North Folk. You go there and the line
4 snakes around. You can buy pumpkins and gourds and things
5 of that sort and buy 27 different varieties of apple pie
6 that are really expensive, but they draw a big crowd. I am
7 not imagining any of those people taking the next car for
8 the chocolate cream pie that has to be in the refrigerator
9 and going out attending an auction sale.

10 THE WITNESS: Either am I, Judge. I am not
11 assuming that they are going to pass buy and see my auction
12 sign and stop in. We are going to have a sign stating the
13 sale when it is going to take place.

14 THE COURT: You can make a deal where you have
15 these pies for sale there.

16 THE WITNESS: You'll get more people in that
17 way. That can be a satellite location.

18 THE COURT: You can run a sub-franchise.

19 THE WITNESS: The Trustee won't even have to
20 know.

21 THE COURT: You can probably serve apple cider
22 too. Are you aware of any other public events either town
23 parades or Oktoberfests or anything of that sort that are
24 likely to draw people based upon pre-existing advertisements
25 and notices. That there are some weekends that are

1 especially designated to draw substantial crowds supported
2 by the Chamber of Commerce, other tourist bureaus and local
3 businesses, where there is a tradition of people going out
4 to this area for community activities.

5 THE WITNESS: People will come out there for
6 the sole purpose of this auction. That's why they'll come.

7 THE COURT: So, you're saying that you are not
8 going to depend on walk-in traffic.

9 THE WITNESS: I am going to depend upon drive-
10 by traffic for two or three weeks prior to the auction sale
11 for them to see the signs that we have posted on the
12 premises. It is basically on the only road to get out
13 there. So anyone who lives there or passes there, will see
14 these signs.

15 THE COURT: Okay, but you're not hitting a
16 tourist trade.

17 THE WITNESS: No, I'm not.

18 THE COURT: And why can't this be held in
19 November so you will have more time and may be make some
20 legal determinations in the interim?

21 THE WITNESS: If it had to be held in
22 November, it could be held in November. There are still
23 people out there. When I spoke -- actually when my office
24 spoke to Felicia, we were concerned initially about the time
25 of year also to get the sale done. She told us that between

1 September 15th and the end of October was her busiest
2 season, after the people that rented their houses out for
3 the summer returned. That was her real customer. Now,
4 again, I'm taking it from the principal of the debtor whose
5 word really doesn't mean much, but she had no reason to
6 really lie about that.

7 THE COURT: But the point is if you can
8 attract people and the weather conditions still permit
9 travel out there, may be people go out to that part of the
10 world to buy turkeys. I don't know what goes on out there.
11 I try to stay away from that area.

12 THE WITNESS: Judge, if you asking me if there
13 is a difference between the last week in October and the
14 first week in November, I would say there isn't. Once we
15 get closer to Thanksgiving, I think it would get a little
16 more difficult.

17 THE COURT: What happens if we shoot for the
18 weekend of the 15th of November, if that's a weekend day?

19 Q Well do we have rent accruing on the premises?

20 THE COURT: There are some accrual costs.
21 There is no doubt about that.

22 A We have you in our costs. We have utilities
23 costs. We have the alarm company costs. We have the risks
24 of theft and loss.

25 MR. ACKERMAN: You were aware that I was having

1 difficulties procuring insurance and it went on for weeks
2 and weeks.

3 THE COURT: You can collaborate with the
4 members here. They'll form a posse who will lead and
5 protect the property. They'll stand on guard in rotation.
6 Look, one of the concerns is that we are rushing into this.
7 I am not indifferent to the holding costs. I am not
8 indifferent to the sales expenses, but maybe somebody can
9 represent to the Court what the per monthly costs are in
10 maintaining the premises in their present condition. What
11 is his burn rate as we say for administrative overhead?

12 MR. ACKERMAN: The one -- I believe --

13 THE COURT: How much are you paying for rent a
14 month?

15 MR. ACKERMAN: I believe the rental, Judge, is
16 \$6,000 or \$6,500.

17 THE COURT: That's the most money that it will
18 ever make.

19 MR. ACKERMAN: And the landlord already got one
20 eviction, et cetera. The insurance --

21 THE COURT: We also know that he had no
22 tenant. He just wanted to make sure that before the
23 opening of the next season, he would be able to rent it and
24 he recognizes that if this case dragged on to the end of the
25 summer, he was going to get had.

1 MR. ACKERMAN: He's saying -- one of the things
2 he was saying to me, Mr. Milieus who represents the landlord
3 was saying to me that if the sale doesn't start going
4 through, he is going to start making motions to let it stay,
5 et cetera, et cetera.

6 Another cost is of Phoenix New York, which is my
7 insurance broker. They've told me that the deposit that
8 must be made for the insurance is \$3,280.52.

9 THE COURT: That's a month?

10 MR. ACKERMAN: I said will I get it back if I
11 can do a sale in two weeks, and they said no, but you'll get
12 charged a lot more if you hold off.

13 THE COURT: What I am trying to do is
14 determine what your holding costs are.

15 MR. ACKERMAN: I don't know how much more they
16 are going to charge, Judge.

17 THE COURT: What's the period of coverage?
18 When does the policy lapse?

19 MR. ACKERMAN: The policy just went into
20 existence today or yesterday.

21 THE COURT: Okay so you have 30 days out of
22 the policy?

23 MR. ACKERMAN: Yes. We found out on September
24 8th that Ms. Brunesco had not paid and therefore the old
25 policy had been cancelled for non-payment. I was calling

1 Vince Caruso who is the person used by Trustees as a broker
2 to get insurance. We went through so much nonsense. There
3 were three or four questionnaires. I was calling on a
4 daily, sometimes three times a day basis.

5 THE COURT: Mr. Ackerman, I have no doubt that
6 you have all kinds of aggravation. I'm simply trying to
7 find out what the number is.

8 MR. ACKERMAN: She wouldn't tell me how much
9 more. All she would say to me is that this will not be
10 refunded no matter what.

11 THE COURT: Okay, so you can't now ascertain
12 what your costs are to hold this for more than 30 days?

13 MR. ACKERMAN: Other than the extra rentals
14 Judge, I don't know.

15 THE COURT: What about the utilities?

16 MR. ACKERMAN: How much are the utilities?

17 THE WITNESS: You have to consider heat also
18 if we start going into November.

19 THE COURT: I understand that, Mr. Maltz. I'm
20 just trying to get a number. I'm trying to determine
21 whether the holding costs is \$10,000 to \$15,000 a month and
22 whether in light of these considerations, that's a cost
23 unfortunately that has to be borne by the estate.
24 Ultimately it comes out of the creditor's pockets. Some of
25 these people thing they are going to prevail and convince me

1 that they can remove their goods. I don't know what they
2 are going to convince me to do, but if they lose that fight
3 and they become creditors, then it is in their interest to
4 reduce the administrative expenses. Because every dollar
5 that gets paid above the line is one less dollar for them to
6 have distributed. We don't even know the magnitude of the
7 claims. If there are substantial claims for conversion,
8 then people will have bonafide claims for goods that were
9 sold on an order of the Court. They are going to have to
10 share those proceeds with other persons who have been
11 subject to conversion. So Ms. Kessler may be here in two or
12 three different categories. So, she might find that it's in
13 her interest to keep the cost down. If she has a claim for
14 conversion, and the Trustee can't recover the goods from
15 whoever holds them, she is going to be in a very different
16 position than some of the other people who have spoken here
17 today who have goods that they believe are on the premises.
18 And your position may change from time to time as the
19 information gets better. Is it a fair estimate to say your
20 holding costs after October 1st are going to run about
21 \$15,000 a month.

22 MR. ACKERMAN: I would estimate at a minimum,
23 Judge.

24 THE COURT: What else is there on top of it?
25 There's utilities.

1 MR. ACKERMAN: There's heat, utilities. I know
2 that Mr. Maltz will be charging labor costs as he will be
3 requesting reimbursement of labor costs for every time --

4 THE COURT: His labor costs are not going to
5 increase if he is going to have a delayed sale.

6 MR. ACKERMAN: If he has to go out and keep on
7 showing inspection, we have to inspect the premises, and
8 make sure it is safe and things of that nature. If we
9 delay, yes.

10 THE COURT: And then the building of this
11 character, I don't know how well it is insulated, is it
12 going to keep the temperature fairly low. These are things
13 that are not going to freeze.

14 THE WITNESS: We talking about keeping it
15 above freezing so the pipes don't freeze. I would be more
16 concern, Judge, about the risk of loss than anything else.
17 The store is secure, but if somebody want to gets in, you
18 are going to get in. Yes, it is alarmed. And we did
19 contact the Southampton Police Department and make them
20 aware of that.

21 THE COURT: Yes, but I assume that since these
22 people may be residents of Southampton, they are going to
23 make sure that the police drive by on a fairly regular
24 basis. These are armed citizenry, right? They probably
25 have better access to the Southampton Police than you do.

1 MR. ACKERMAN: Actually Judge --

2 THE COURT: They may be well known by the
3 police because of their active contributions to the police
4 benevolent society not because they have been locked up for
5 drunk driving or for spousal abuse. In fact they may even
6 be schoolteachers. I'm sure Mr. Davidow knows everybody in
7 town. How may police do you know Mr. Davidow by first name?

8 MR. DAVIDOW: I don't know any.

9 THE COURT: You don't know any.

10 MR. DAVIDOW: I've only lived there for nine
11 years. Before that, I lived in Patchogue.

12 THE COURT: You aren't a native by any
13 stretch. You have to be there 300 years before it starts to
14 count.

15 MR. DAVIDOW: Probably more.

16 THE COURT: Mr. Davidow, it satisfies you that
17 I have your interests at heart.

18 My daughter-in-law traces her ancestry to the
19 Clarks. They first settled in Southampton in about 1650,
20 and one of the succeeding generations was a signatory to the
21 Declaration of Independence. So my grandson, odd that it
22 is, when his grandfather's name is Bernstein, has a right to
23 participate in DAR activities.

24 There's no end to perspective is there? So, we
25 need to cut to the chase. Any further questions of Mr.

1 Maltz?

2 MR. ACKERMAN: None that I can think of at this
3 point.

4 THE COURT: Anyone want to ask Mr. Maltz
5 questions?

6 MR. DAVIDOW: I have a question.

7 THE COURT: Go ahead Mr. Davidow. Approach
8 the microphone, please.

9 CROSS EXAMINATION

10 BY MR. DAVIDOW:

11 Q If you are going to hold this sale, what time of
12 day are you going to have it?

13 A What time of day?

14 Q Yes, what time of day will it begin?

15 A Normally the inspection would begin at 9 a.m.
16 The auction would begin at 11:00. We would probably have a
17 viewing the day prior to the sale as well as the morning of.

18 Q And you expect to get people from all over to
19 come to this sale?

20 A That is correct.

21 Q Have you ever been traveling east on Sunrise
22 Highway between 7 and 10 in the morning and get to the end
23 of the Sunrise Highway?

24 A Unfortunately, I have.

25 Q Can you describe that to us?

1 A It's a parking lot.

2 Q About three miles long?

3 A If you say. I would guess five.

4 Q And you think all of these people you are going
5 to advertise to are going to come through that?

6 A Yes.

7 THE COURT: Do you want a midnight madness
8 sale Mr. Davidow?

9 MR. DAVIDOW: Excuse me?

10 THE COURT: Do you want a midnight madness
11 sale?

12 MR. DAVIDOW: All I know is I avoid going to the
13 end of the Sunrise eastbound between 7 and 10 in the morning
14 and so does everybody else.

15 THE COURT: So, you're telling me that you
16 believe that the sale should open at 2:00 with an
17 opportunity to inspect by noon?

18 MR. DAVIDOW: I'm saying that it is only the
19 tourists who are willing to brave that in the morning, and
20 they are only there until Labor Day. After that, you have
21 only workman causing the traffic jams because the workman
22 can't afford to live in the Hamptons.

23 THE COURT: Okay.

24 MR. ACKERMAN: Mr. Davidow, when would you say
25 it would be better? 12:00?

1 THE COURT: I'm trying to determine whether
2 you think there are any hours of the day.

3 THE WITNESS: Neal, the auction is going to
4 take probably 5-6 hours. We are also dealing with losing
5 daylight in November. By 5:00, it's pitch black outside.

6 THE COURT: Look, this is not comments from
7 the gallery. You want to ask Mr. Maltz a question, you will
8 be given that opportunity.

9 MS. KESSLER: I know my time is in question.

10 CROSS EXAMINATION

11 BY MS. KESSLER:

12 Q Do you believe that the traffic out here is the
13 same as in Manhattan for the upscale customer that would buy
14 expensive furniture like they house in Morgansen's at the
15 moment?

16 A I am not sure I understand your question.

17 Q I'm saying don't you -- do you feel that the
18 traffic and the crowd that is presently out in the Hamptons
19 at this time, I am a resident of Southampton, do you feel
20 that it is equivalent to the traffic and the volume of the
21 crowd that is in Manhattan at this time?

22 A At this time, I would say there physically more
23 buyers of that caliber in Manhattan. But I am also fairly
24 confident that they will travel out to the auction sale.

25 Q Have you ever been out to the Hamptons in the

1 fall?

2 A Yes, I have.

3 Q And have you gone to a restaurant? How do you
4 compare the volume of people out here compared to August
5 which is our selling season?

6 A How would I compare the volume of?

7 Q Of people in the area who are willing to come
8 here and spend the weekend et cetera?

9 A I think there will be a large volume of people.
10 People are going to come especially for this auction sale.
11 They are not going to come out to look at the leaves change
12 and buy a pumpkin and come to an auction. They are coming
13 out here because there is an auction. The people who live
14 out here will just be coming because it is the auction.

15 Q Right. Isn't it the main interest to get the
16 most money out of this auction and the highest bid on the
17 property?

18 A Without a doubt.

19 Q Okay. So the more volume of people and the
20 longer length of time they can view it would be an issue.
21 Right?

22 A Well it's not the volume of people. It's the
23 type of person. We don't want what we call tire kickers.
24 We want real buyers

25 Q I just want to mention something that is a little

1 weird. I don't know if you have ever done it, but I have
2 auctioned merchandise on E-Bay that I could not sell
3 nationally, and have sold internationally for huge amounts
4 more than what I could ever get in Southampton. Did you
5 consider that option, because you can put an auction on E-
6 Bay for ten days and reach worldwide buyers internationally
7 since you have a lot of rare and unusual furniture,
8 sculptures, et cetera.

9 A The sale is advertised on our website, and I
10 spoke with Mr. Ackerman about maybe there would be maybe a
11 half a dozen or a dozen items in the store that if they
12 don't realize what we feel the true value is, we would go to
13 other means to market them.

14 MS. KESSLER: Okay. Just so that you are aware
15 as a person who deals in antiques and jewelry and such, that
16 the most valuable place you can if you are going to take the
17 property of the people who have consigned their goods to
18 Morgansen's would be through E-Bay because you would have
19 ten days notice to worldwide?. That's just a think I would
20 like to mention.

21 THE WITNESS: Okay.

22 THE COURT: Why would you have to go to
23 Morgansen's if you could sell it by E-Bay?

24 MS. KESSLER: Well if the bankruptcy is
25 purporting to attach these assets --

1 THE COURT: No, Ms. Kessler, why would you --
2 if you know about the E-Bay facilities, why would you not
3 yourself resort to E-Bay and sell your items over the
4 internet rather than --

5 MS. KESSLER: That is the way I do it now, but I
6 have been waiting for over a year to get my goods back from
7 them, and it was just a business I had gone to them in the
8 summer of 2001. It didn't seem to work out. So I took the
9 merchandise back. I also live out here, and it is
10 completely dead now, and most people don't travel to the
11 Hamptons. I used to own a shop in the Village, and I live
12 in Southampton Town, so I don't know if that's the best in
13 the interests of the estate.

14 THE COURT: We have conflicting comments here.
15 Mr. Davidow, it's mob that you don't even want to go near
16 there.

17 MS. KESSLER: That's not true.

18 THE COURT: And then there is no one there.
19 And I don't know how to reconcile those values.

20 MS. KESSLER: That's totally not true. People
21 mostly rent in the Hamptons in the summer. I have a home,
22 and either people rent from me from May to September 15th,
23 and they live. They go to Paris. They go to London.
24 Nobody is here anymore except for some people who live here.

25 THE COURT: Thank you. Anyone else have any

1 question of Mr. Maltz.

2 MR. ACKERMAN: I just want to make one thing
3 clear. When I heard the E-Bay thing, it sounded great, but
4 Ms. Cavanagh pointed out to me that they are not bonded
5 auctioneers. There may be some bonded E-auctioneers, but
6 Mr. Maltz is bonded, and that makes a grave difference. It
7 means that if there is a theft or conversion of the items, I
8 can sue on the bond, things like that. You testify Mr.
9 Maltz.

10 THE WITNESS: Also there can be return
11 problems. I mean, payment problems, shipping problems. The
12 goods aren't as described.

13 RE-DIRECT EXAMINATION

14 BY MR. ACKERMAN:

15 Q Are you required to be bonded in order to act as
16 an auctioneer in the Eastern District of New York?

17 A Yes, that is correct. I spoke to Ms. Cavanagh
18 about that the other day.

19 THE COURT: Okay. Any other points?

20 MR. FAVER: Just real quickly Judge.

21 CROSS EXAMINATION

22 BY MR. FAVER:

23 Q You may have mentioned this already. Have you
24 conducted auctions in the Hamptons?

25 A Yes, I have.

1 Q Approximately how many?

2 A Probably a half a dozen.

3 Q And when was the last one?

4 A I sold a house in Quogue probably a year, year
5 and a half ago. We had a retail store in Watermill, other
6 property, boat yards.

7 Q Have you ever sold items as those that we are
8 discussing today?

9 A Not in the Hamptons.

10 Q When is the high season?

11 A When is the high season for where?

12 Q The Hamptons?

13 A I would think anytime June, July, or August.

14 Q So October is after the high season, correct?

15 A Without a doubt. I don't think that's an issue
16 here.

17 Q Will items sell for a higher price during the
18 high season?

19 A It's really very difficult to say. You have two
20 people there who want that item, it could be in the dead of
21 winter, and it will bring more money than the high season.

22 Q So the more people you have, the chances are the
23 higher the price will accrue, correct?

24 A No, that's incorrect. The more real buyers you
25 have, the better the chances are.

1 Q And the higher number of people you have, the
2 chances are, the higher number of real buyers you have,
3 correct?

4 A Not really.

5 Q Would it be an inordinate burden -- approximately
6 how many items are there out there.

7 A A good estimate is probably 500 items. I could
8 be off by 100 items either way.

9 Q 500 items. And you already testified I believe
10 of multiple sales, not simply just one auction, correct?

11 THE COURT: He said two sales.

12 A I said it is possible that we may elect to do two
13 sales. I would need to discuss that with Mr. Ackerman.

14 Q Would it be an inordinate burden than to withhold
15 say 30 to 40 auction items for the second sale?

16 THE COURT: Mr. Faver, you were already
17 indicated that we are not going to treat these persons who
18 are here today more favorably than others who are similarly
19 situated. So I don't know what the universe is of persons
20 who claim to have entered into consignment agreements or
21 whatever they are.

22 Q Would it be an inordinate burden -- Well, you do
23 intend to create an inventory, correct -- to create an
24 inventory of exactly which goods are there, correct?

25 A To trade inventory?

1 Q To create inventory?

2 A To create an inventory list. That is correct.

3 Q And that inventory will include this 500, 600
4 number of items.

5 A I will include every single item in that store as
6 well as fixtures, safes, lighting fixtures, anything there
7 we are planning on selling.

8 Q And Mr. Ackerman mentioned earlier that there are
9 approximately 200-300 or perhaps slightly more consigned
10 orders of people who are similarly situated you are
11 objecting, correct?

12 A Well, I don't think -- what he found was names of
13 200 people. We're not sure that they have anything in that
14 store. We basically went through books and records to try
15 to recreate documentation and make up a list. I assisted --
16 my staff assisted in helping Mr. Ackerman's people go
17 through drawers to look for consignment agreements. Some of
18 them go back many years. These people may have nothing
19 there at all.

20 Q What exact documents or types of documents did
21 you review in creating his list?

22 A I did not create the list. Basically all I did
23 was locate paperwork that I thought Mr. Ackerman or Mr.
24 Ackerman's accountant would want to see: checkbooks,
25 customer lists, Rolodex, consignment forms, whatever

1 paperwork we thought.

2 Q Approximately how many consignment forms did you
3 find?

4 A I didn't count them. I would be throwing a dart.

5 Q So these names, these 200 to 300 names, we're not
6 even sure whether they are consignors, is that what your
7 saying?

8 A That's what I'm saying. Mr. Ackerman didn't say
9 that. These are just names of people that we found on the
10 premises.

11 MR. ACKERMAN: Judge may I address that?
12 Because this has nothing to do with Mr. Maltz.

13 THE COURT: I agree. It has nothing to do
14 with Mr. Maltz.

15 MR. ACKERMAN: What we did was anyone who gave a
16 phone call, anyone, anywhere, who had anything in any books
17 and records, I would write down or I instructed Mr. Ira
18 Spiegel, who is my accountant, to write down. My feeling
19 was I'd rather be over inclusive than under inclusive.
20 There were times Ira, Mr. Spiegel, I apologize, was saying
21 to me I can create a much more firm list. There might be
22 people on here who are not parties in interest anymore. I
23 said, Ira, we have to get this notice out. Prepare the
24 list. Be over inclusive. I don't care. I want all names
25 and all addresses.

1 THE COURT: So you can't really determine
2 without going through the inordinate exercise of trying to
3 tie in every consignment agreement that you have with every
4 piece of inventory.

5 MR. ACKERMAN: No.

6 THE COURT: It would be a very expensive
7 procedure.

8 MR. ACKERMAN: Indeed, the people I would speak
9 to on the phone I would often times say can you make sure
10 you send by fax your name and address and the place where
11 you want notices to be sent to Mr. Spiegel. I gave his fax
12 number, and they would say to me, I can't get my list
13 together of items, and I think Felicia Brunesco stole stuff
14 and I said you will send that to Ira later. Right now, we
15 have to get the list. Just get your addresses over as
16 quickly as possible.

17 MR. FAVER: Judge, I agree with where I think
18 you were going about putting this off at least until
19 November to sort out all of these legal issues, if that was
20 possibly an idea you were entertaining.

21 THE COURT: Mr. Faver, you know you are not
22 counterpunch with me, because I am much better at it than
23 you are.

24 MR. FAVER: I'm not trying to whatsoever. I'm
25 trying to understand.

1 THE COURT: I didn't say I was going to put it
2 off to November. I'm still trying to determine what the
3 holding costs are, what would be the most appropriate date,
4 and just because I asked a question doesn't mean I made any
5 determination.

6 MR. FAVER: And I didn't suggest otherwise, your
7 Honor. I got the impression that it was one possible option
8 that was being considered by the Court; and if that's the
9 case, then another possible option which I was trying to
10 sort out now is if there is going to be two sales and we can
11 just pull out the consignment agreements and find out
12 exactly the number of consignment agreements there are,
13 which I don't think is too difficult of a task, I would be
14 willing to help myself in that regard, then we can have the
15 second sale be those items that are in dispute today in the
16 Court. I am trying to relieve the Court of having to go
17 through a rush decision which is what everyone's concern is
18 here. I'm just trying to work with the Court and to try to
19 come up with creative ideas of resolving the procedural
20 issues as well as the merits, Judge.

21 MR. ACKERMAN: Do you want me to address Mr.
22 Faver's.

23 THE WITNESS: I don't know. I don't know if
24 there was a question before you.

25 MR. FAVER: It was a response to Mr. Ackerman.

1 THE COURT: Okay, fine, thank you.

2 MR. GOLDBERG: I have a question, your Honor.

3 THE COURT: Mr. Goldberg.

4 CROSS EXAMINATION

5 BY MR. GOLDBERG:

6 Q Mr. Maltz, did you have access to the second
7 warehouse that was mentioned previously?

8 A I have not.

9 THE COURT: I don't know what you are talking
10 about. How should he know. What second warehouse are you
11 talking about?

12 MR. GOLDBERG: There was a mention before by
13 the Trustee, your Honor, about a second warehouse.

14 THE COURT: Do you have an address and a
15 location?

16 THE WITNESS: I do not.

17 THE COURT: Do you have an address and a
18 location Mr. Goldberg?

19 MR. GOLDBERG: No, I do not, your Honor.

20 MR. ACKERMAN: Judge, what has occurred is this.
21 There has been information provided to me of other
22 possibilities. I would have to do an Order to Show Cause
23 and Attachment Order. I do not want to say anything further
24 on the record, because this will be able to be read by the
25 very person I might be suing.

1 THE COURT: So, you're continuing an
2 investigation based upon some leads you have gotten from
3 some of the people who have called you, and you are not
4 prepared to disclose on the record a warehouse now.

5 MR. ACKERMAN: I don't know the address.

6 THE COURT: All right fine. Presumably you
7 are dealing with that on some reasonably expedited basis.
8 Okay. Anything else?

9 CROSS EXAMINATION

10 BY MR. PAPE:

11 Q Mr. Maltz, how often do you sell or have you
12 conducted an auction of antiques specifically?

13 A How many times over the last 25 years?

14 Q Yes.

15 A Many.

16 Q Can you put a number on it?

17 A 30-50.

18 Q So out of 1,000 auctions that you have had in the
19 last 25 years, about 3% of them --

20 A I've done 1,000 bankruptcy sales. I'm guessing.

21 Q But a very small percentage of your overall
22 business is in antiques, I take it?

23 A That is correct.

24 Q Do you find that typical bankruptcy sales or an
25 auction that you hold, the people come from locally or they

1 travel from afar?

2 A Both. Local and they travel. It depends on the
3 item that you are selling.

4 MR. PAPE: I would just like to submit to the
5 Court that antiques -- I think one of the biggest problems
6 that Morgansen's had is that they were trying to fit a round
7 peg into a square hole.

8 THE COURT: Do you want to explain that to me.

9 MR. PAPE: Well Louis XIV gilded chair doesn't
10 seem to sell well in the Hamptons in a turn of the century
11 shingled house, and I think a lot of the merchandise that is
12 contained in the Southampton store is better suited for
13 possibly people that live in Manhattan or in other areas --
14 possible suburban areas.

15 THE COURT: You're not going to get Sotheby's
16 to come in at this level, are you?

17 MR. ACKERMAN: Judge, I had thought about that,
18 and I am just going through a case now called Howard Adler.
19 It's a matter of record.

20 THE COURT: What's that?

21 MR. ACKERMAN: It's a case before Judge
22 Signowski called Howard Adler and what happened is we
23 consigned stuff to Christy's. It was the most horrible
24 experience. They do sales once every nine months. They
25 refused to show it -- they will show it whenever they feel

1 it is appropriate, and then if they don't sell it after
2 maybe three years -- I think it was two years -- and I think
3 there were two times that they would put it up for sale,
4 they give you a phone call. Pick up your stuff by tomorrow.
5 And that is what just happened to me. I just had to run
6 down there and pick up three paintings which we had
7 consigned to Christy's under an order of Judge Signowski. I
8 do not want to use them. These were things that I thought
9 about when I was considering how to go about the sale.

10 THE COURT: I assume there are dealers who
11 deal with different kinds of objects, and there may be ways
12 of treating this. You're tending to treat this as an
13 undifferentiated mass, and it may be possible to have
14 dispositions that use different persons. But I agree that
15 you are not going to the large houses and get very much
16 interest on this stuff. It doesn't pay for them to put a
17 dozen items through their catalogues.

18 But I don't know what's the largest auctioneer or
19 specialized antique dealer in this part of Long Island. I
20 assume there are a number of competitors of Morgansen's who
21 are located -- that have much more space and maybe some of
22 these people have dealt with them in the past and maybe
23 there is someone else who might be able to assist. But, as
24 I say, those are your judgments to make.

25 The only question is, is there is something

1 inappropriate about this sale because it is not the function
2 of the Court to make a determination whether I think there
3 is a better way of getting value or a creditor's way of
4 getting better value. It's really something within the
5 Bankruptcy Court's purview, to at least determine that an
6 auction sale should not be authorized at all or is it merely
7 a question of timing. I am not waiting until July and
8 August in the high season and burdening Mr. Ackerman with
9 the overhead costs to get to high season.

10 Anything further, Mr. Ackerman?

11 RE-DIRECT EXAMINATION

12 BY MR. ACKERMAN:

13 Q Mr. Maltz do you get phone calls from people who
14 ask to be notified of bankruptcy sales?

15 A All the time.

16 Q Do you have a special list for such persons?

17 A Yes, we do.

18 Q Do they often appear at these sales?

19 A Yes, they do.

20 Q And do you also get lists from the Trustees
21 themselves of people who have asked to be notified of
22 bankruptcy sales?

23 A That is correct. Just since we had the notice of
24 this bankruptcy posted on the door at Morgansen's, we
25 probably have received 30-40 phone calls from people who

1 want to be notified when the auction is going to take place.
2 You're a builder?

3 MR. PAPE: Yes.

4 THE WITNESS: I spoke to someone who is
5 building a 25,000 sq. ft. house that is going to be
6 completed in November who wants -- he can't wait to get into
7 the store with his wife, to come to the auction to see
8 what's there. So there are people there. There is money
9 there.

10 MR. PAPE: I think antiques are a specialized
11 area. I lived in Englewood, New Jersey for a while, and I
12 had a home there and collected a lot of stuff. Went to a
13 lot of auctions and bought a lot of stuff, and I have --

14 THE COURT: Mr. Pape, where were you living?

15 MR. PAPE: Englewood, New Jersey.

16 THE COURT: Englewood.

17 MR. PAPE: Yes. I had a yard sale at one time.
18 I was very unsuccessful, and I hired a company by the name
19 of Regal Antiques, and they advertised this thing. You
20 wouldn't believe, but I would say at least 750 people walked
21 through my house and I had an unbelievable turnout. Now,
22 I'll tell you that I have averaged -- I had a yard sale. I
23 advertised in the newspaper, and put signs up on the street
24 and all of that, and the showing was horrible, and I hired
25 the right people. I'm wondering -- I would suggest, I mean

1 you are going to be involved in this, that you might want to
2 think about working with someone who specializes in
3 antiques.

4 THE WITNESS: I work with other auctioneers
5 who specialize in antiques. If we don't know what something
6 is, we call them in. They make the determination as far as
7 value or where an item should be placed or sold, we do that.

8 MR. PAPE: But 80% of the things that are going
9 to be sold are going to be sold to dealers, and getting a
10 list of dealers and finding the dealers out there, I think
11 is where it makes sense to work in conjunction.

12 THE WITNESS: I hope you're wrong and 80% of
13 the stuff in there is sold to end users and not dealers, and
14 the dealers are standing there not being able to buy
15 anything.

16 MR. PAPE: It's possible, but you are going to
17 find a lot of dealers are going to be interested.

18 THE WITNESS: We're definitely going to find a
19 lot of dealers there.

20 THE COURT: This isn't a debate. Ask him a
21 question, he'll tell you. I know this is a function of some
22 of you being non-lawyers. If you have some suggestions,
23 what you believe would realize higher value, I'm sure Mr.
24 Ackerman is all ears. So if you have some suggestions how
25 you think this could be more effectively marketed than the

1 proposal he made, let him know about it.

2 MR. PAPE: Your Honor, I would just like to say
3 this. I would like to hear from someone who is certified in
4 appraising antiques and someone who specializes in that
5 business to view the items at Morgansen's and render an
6 opinion on whether or not that is in fact the proper venue
7 for this sale. Thank you.

8 THE COURT: All right. If you have a
9 suggestion, give it to Mr. Ackerman. Okay. Ma'am.

10 MS. GOLDBERG: My name is Barbara Goldberg, and
11 I would just like to address -- This is just information for
12 Mr. Ackerman. Several months ago we stopped off at
13 Morgansen's to see if any of our property had been sold, and
14 we already found several chairs there. We didn't see
15 anything else, and we said Felicia where are our things.
16 She said well I like to rotate my stock, and I have them in
17 a warehouse, and now I am very busy and I can't speak to you
18 anymore. And she was with some customers so we left.

19 When we went to the viewing at Morgansen's, I
20 believe it was last Friday, most of those things but not
21 all, were back. And I am just wondering did she have
22 someone bring them from somewhere. Suddenly, they were
23 back.

24 THE COURT: Is this a question of Mr. Maltz?
25 If you want to talk to Mr. Ackerman, you don't need to use

1 me as a conduit. You can talk to him directly. If you
2 think there are some things that call for an investigation,
3 talk to him.

4 MS. GOLDBERG: Judge, I just wanted to have my
5 turn to speak, and I wanted to have this on the record. So
6 thank you for the opportunity.

7 THE COURT: Thank you Ms. Goldberg. That's
8 what the purpose of this meeting on October 9th is. But if
9 you can provide information to Mr. Ackerman, preferably in
10 writing, he will be able to follow up.

11 CROSS EXAMINATION

12 BY MS. KESSLER:

13 Q Would it be feasible to have two auctions since
14 you are looking to quickly catch a season and possibly sell
15 the merchandise that you have on record that Morgansen's
16 owns that they have records that they have purchased as a
17 buyer and then subsequently give the Court time to determine
18 the issues on the consigned good for the ownership and
19 whatever we are contesting today, and that way you would
20 take the benefit of the season for part of the goods.

21 A That's really a decision for Mr. Ackerman to
22 make.

23 Q So you don't have like a separation of goods that
24 Morgansen's owns and goods that consignor's have?

25 A The only goods I know that belong to consignors

1 is the people who came in last Friday, and identified their
2 items, and were you there last Friday?

3 Q I think I went on one of the days. I don't
4 remember.

5 A And we put a tag on those items, but the problem
6 being most of the list will say, one painting. There are
7 100 paintings in the store.

8 Q So, how are you determining what is the property
9 of Morgansen's that they have purchased as a buyer and what
10 is the property of consignors?

11 A When the consignors come in with their
12 documentation.

13 Q But you haven't notified all of the consignors
14 because you don't even know who they are. Is the owner of
15 Morgansen's, Felicia, required to give you a list?

16 A Mr. Ackerman has been speaking for the last five
17 hours about a list of 200-300 names that he created.

18 Q But you don't know who has property, and who
19 doesn't, what Morgansen's owned, what other people owned, so
20 you want to go ahead an auction all of it together without
21 it. Is that correct?

22 A That is correct.

23 MR. DUBIN: Your Honor.

24 THE COURT: I'm telling you. You're pushing
25 the point. Go ahead.

1 MR. DUBIN: I have been in this business for 55
2 years.

3 THE COURT: What business?

4 MR. DUBIN: The antique business. I deal with
5 Christy's and Sotheby's. I have worked with Doyle in sales
6 out there in Long Island. I know the inventory at
7 Morgansen's. If it sells, it will not sell to cover his
8 costs and their costs. Nobody will get a dime. I know this
9 business. The only fair thing to do is to give back to the
10 consignors the things that they can actually prove belong to
11 them and garbage the rest because that is what is going to
12 happen.

13 THE COURT: Thank you.

14 THE WITNESS: Am I excused Judge?

15 THE COURT: Yes, Mr. Maltese.

16 THE WITNESS: Thank you.

17 THE COURT: I'm going to talk to the Clerk. I
18 am no longer taking cases for the Hamptons.

19 Mr. Ackerman, do you have any closing argument?

20 MR. ACKERMAN: Yes, thank you Judge. I believe
21 that consigned property is clearly property of the estate.
22 I request authorization to conduct the sales as soon as
23 possible. I will take all of these things in mind because
24 my desire is to optimize the price. I pride myself on
25 getting the best distribution I can for the creditors. I

1 will take every single one of these in mind and I will
2 consult with Mr. Maltz. Perhaps we should have someone
3 assisting.

4 MALE VOICE: How can you sell my property
5 without my permission.

6 MR. ACKERMAN: That's a matter of law. That is
7 my closing comment. I respectfully request that the relief
8 granted be given, your Honor.

9 THE COURT: I will consider it. But I do
10 think you should discuss with Mr. Maltz a date later than
11 the one you requested.

12 MR. FAVER: Judge?

13 THE COURT: Yes.

14 MR. FAVER: Can I have one minute to review as
15 well?

16 THE COURT: I just asked him to summarize his
17 position. You've summarized your position on several
18 occasions. What is it that you want to say, Mr. Faver?

19 MR. FAVER: Just briefly, Judge. I think that
20 when you look at the merits of the legal issues who have
21 been asked to resolve, they clearly weigh in favor as my
22 paper suggests and as the argument this morning as I laid
23 out suggests in favor of these consignors. Article 9 rather
24 does not apply and Article 2 doesn't apply either. It's
25 common law agency and the goods ought to be returned to us.

1 And I think the Court sees a very serious concern with the
2 timing of all of this and the rush to do it. And maybe a
3 moment should be taken to reflect to make this gets done and
4 gets done right and properly and fairly before these people,
5 my personal belongings are liquidated, and we no longer have
6 the chance of having them returned which would be the
7 appropriate remedy should we prevail in the merits of our
8 objections, Judge. Thank you.

9 MR. GOLDBERG: I have one last word, your Honor.
10 Your Honor, two things. Number one, all of the property of
11 the debtor has not been ascertained. As yet, there may be a
12 second warehouse with goods that we are not aware of.

13 THE COURT: I heard that argument Mr.
14 Goldberg.

15 MR. GOLDBERG: All of the possible consignors
16 have not been identified as yet. There may be others with
17 goods that they left with Ms. Brunesco, and therefore, I
18 believe that this sale is premature. Thank you, your Honor.

19 THE COURT: I expect to see the Memorandum of
20 Law within the next ten days, and I will make the
21 appropriate suggestion on orders. I suggest that all of you
22 if you wish to attend the meeting, it will have to be on a
23 date other than October 9th, and it will have to be at a
24 facility other than the initially scheduled hearing room,
25 but recognize that Trustee has certain priority rights to

1 ask questions, and he may have to determine that it is
2 necessary to bring Ms. Brunesco in and she may come with a
3 lawyer and plead the Fifth Amendment because that is what is
4 going to happen because you are accusing her of being a
5 thief. And if she has any lawyer who is well-counseled, she
6 is going to take the Fifth.

7 MR. PAPE: May I?

8 THE COURT: Of course. The evening is young
9 and it is still sunny out.

10 MR. PAPE: Your Honor, I just want to be clear
11 on one point that I made about the creation of a committee.
12 I would hope that we would be able to form a committee and
13 determine --

14 THE COURT: That's up to you guys.

15 MR. PAPE: Well, appoint some counsel. But I
16 would perhaps ask that this hearing be adjourned until we
17 can be represented by counsel on this matter, and maybe take
18 up some further arguments. I agree and I thank you very
19 much for your patience. We are not attorneys, many of us,
20 and I'm sure it has been exasperating for you, but --

21 THE COURT: It's not exasperating. It's just
22 that when I have heard the point three and four times, it
23 just doesn't make any further sense.

24 MR. PAPE: But it might be helpful for us to be
25 represented by counsel. They may be able to make this point

1 more consistently.

2 THE COURT: Mr. Pape, you know, if you are a
3 builder, this must remind you of some kind of zoning hearing
4 where everyone in the neighborhood comes out and says don't
5 build in my backyard, and you haven't done the appropriate
6 environmental impact statements. And if any of the members
7 on the zoning board dare to approve this plan, we will
8 remove you from office because we didn't move out here to be
9 crowded out by these 25,000 sq. ft. ugly homes. You need to
10 preserve the tranquility of the neighborhood. We hear our
11 traffic studies. If you build seven more homes, everything
12 will be deadlocked. And I am sure some of you have gone to
13 those hearings. Does it play like a zoning hearing?

14 MR. ACKERMAN: So today is the first, Judge, you
15 want papers into you by the 11th, and they would also be
16 sent to me?

17 THE COURT: Yes.

18 MR. ACKERMAN: They would have to be served on
19 me.

20 THE COURT: I want a copy for my chambers. If
21 this is electronic filing, then you are going to have to
22 resort to electronic filing, talk to the Clerk's Office, and
23 I also ask that you submit a copy to Ms. Cavanagh as the US
24 Trustee. So a copy to me, a copy to Mr. Ackerman, and a
25 copy to Ms. Cavanagh. If you want to share claims, you may

1 want to share names and addresses.

2 MS. CAVANAGH: Your Honor, I think for
3 informational purposes, those who cannot electronically file
4 can file by disk to the Court.

5 THE COURT: Okay.

6 MR. ACKERMAN: As I said Judge, I just saw the
7 11th was a Saturday, so it should be October 13th.

8 THE COURT: Fine.

9 MALE VOICE: Will Mr. Ackerman be submitting any
10 sort of papers?

11 THE COURT: I don't think so.

12 MR. ACKERMAN: In the event that I think I would
13 like to submit them, I will make sure that anyone who serves
14 me will be also notified and they, of course, will be
15 served.

16 THE COURT: I don't want this to turn into a
17 paper war. The presumption will be that you'll have an
18 opportunity to make an argument on an expedited basis, but I
19 need to schedule a further hearing on this. I can't have
20 this drag on.

21

22 CLERK: October 14th at 10:30 a.m.

23 THE COURT: October 14th at 10:30 a.m. That
24 will give you an opportunity to go to the meeting of
25 creditors if it can be scheduled before that date. October

1 14th at 10:30 a.m. And I will review your papers by then.
2 By that time, we will have studied these papers further, and
3 we will be in a better position to try to assess all of
4 these items, because I would like to be able to make a
5 ruling on that date.

6 Matter is adjourned. Thank you for your
7 patience.

8 MR. ACKERMAN: Thank you judge.

9 (Whereupon, the hearing was adjourned.)

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C E R T I F I C A T E

I, KAREN KNIPPER, HEREBY CERTIFY THAT:

(A) THE FOREGOING PAGES REPRESENT AN ACCURATE AND COMPLETE
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Karen Knipper, Transcriber